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THEORY OF ADOPTION.

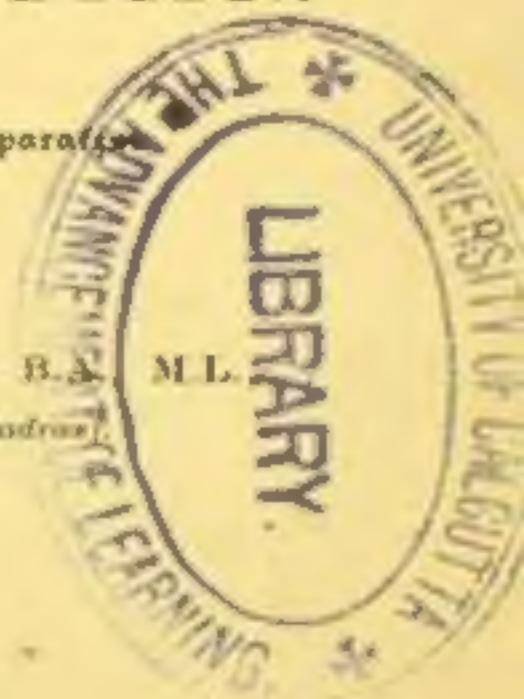
J. C. Ghose's
Research Prize Essay in Comparative
Indian Law for 1903.

BY

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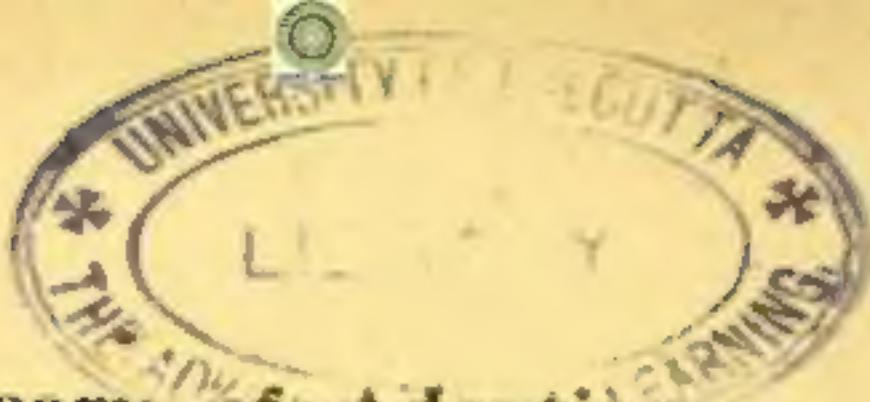
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Theory of Adoption.

"There is a singular disproportion between the space necessarily devoted to adoption in the English works on Hindu Law, and that which it occupies in the early law books. One might read through all the texts from the Sutra writers down to the Dayabhaga without discovering that adoption is a matter of any prominence in the Hindu system" (Mayne, para. 103, sixth edition). In the Manu Smriti itself there are only 4 verses relating to the subject of adoption : they are 141, 142, 159, 168, chapter IX. Of these verse 168 defines the adopted son, while 159 mentions him as one of the six who are heirs, and verses 141 and 142 speak of his leaving the natural family and of his inheriting in the adoptive family, and performing ceremonies to the adoptive parents. In all the other treatises the subject does not occupy larger space, even down to the very recent time when the Dattaka Mimamsa and the Dattaka Chandrika, the two special treatises on adoption, were written. Hence the question naturally suggests itself to all thinking minds, as to what is the origin and nature of this institution of adoption and what is the reason for its gradual development. The theories that have been started with regard to this subject, of course, basing them generally on the authoritative statements of the Smriti writers, may be mentioned as being two-fold. The first theory is what has been denominated the religious theory of adoption, which says that on account of the great importance of the son in the performance of ceremonies for satisfying the ancestors, even in the very early days of the history of the Hindus, a son was considered to be indispensable for every man, and hence when a man had no sons, he satisfied his religious craving for a son, by affiliating a stranger to his own family. This may be characterized as the orthodox view. The second theory says that even in the case of Hindus religion was not the chief motive for the craving for a son, and that it is a vanity of human nature to see that his line is continued, while the origin of the institution itself is traced to a remote period when the existence of a son was a material help in swelling the number of male members in a family, and thus adding to its strength and power in withstanding attacks from outside. We have to examine what is the correct theory that can be deduced from the Smriti texts.

In the Manu Smriti the adopted son is described as follows : " He whom his father or mother gives, with water, in distress, equal, affectionate, he is known as the given son" (v. 168). Now it is admitted by all people that in the later times, the law of adoption was developed by the introduction of the religious theory, and that, therefore, at the present day adoption like marriage is essentially a religious act, and that it is purely and solely for motives of religion, the existence of property not being a condition precedent for the validity of adoption. Hence it becomes necessary for us to examine whether in the earliest times of our Smritis, the religious or the secular notion prevailed. It cannot be denied that every society must, previous to the development of religion and Godhead, have passed through stages of comparative simplicity and absence of intellectuality, and of irreligion and thoughtlessness about God and the future. And in those remote and semi-barbarian stages of society, any idea of religious merit is absolutely out of the question. In such cases if a family comes to the verge of extinction by the last male, he being an old and decrepit man, it may perhaps be that he would try to get hold of somebody to look after him during his old age, and consequently for the trouble of having done that allowed him to take whatever property the man would leave behind. But there would absolutely be no motive, apart from the probability or otherwise of the acceptability of such a fiction as sonship, for the old man to consider that the youngster whom he has secured is his son and will continue his lineage. Even if by the mere continuous contact and living together of the persons, a certain amount of attachment and affection grows between them, which must be naturally the case, there is no reason whatever for supposing that the deception of considering him his son and calling him like that, should also have taken place. The one can exist without the other. Hence it seems to me, that the view advanced by some jurists that the affiliation of sons is to a large extent based upon the original necessity of every family to be well-fortified and equipped with young men who not only support the older ones, but also protect them by preventing external attacks natural and perhaps common too in the early stages of society, does not fully explain the *fiction of sonship* that is at the base of the whole law of adoption. It, therefore, still becomes necessary to examine why even in those early stages of Hindu society at any rate, when adoption was in vogue, though not perhaps to the extent to which it has been subsequently or is at present, there was the fiction of sonship introduced. Some answer the question by saying that the vanity that is inherent in and characteristic of every man in the world, makes each wish and desire that his name should ever be known and spoken of in

this world by his line being continued, but even this answer does not strike me as fully explaining the reason for the introduction of the fiction of sonship, inasmuch as I cannot conceive of human nature restricting itself to this of all methods of satisfying its vanity, when there are numerous ways for such satisfaction. Hence arguing from the possibility of the case, it seems to me that much more potent and powerful influences than those should have been at work in compelling men to accept the fiction of sonship in even such early stages of society, and to lavish upon those who are utter strangers, completely known to be so, that family affection which is proverbially strong among us Hindus, and that influence I shall try to trace in the Hindu society with the aid of the materials furnished to us by the Smritis and other works.

In the first place, it is very necessary to exactly comprehend in what view and estimation a son was held even in the remote antiquity of Hindu society when the Vedas were written. In the Rig Veda it is said: "The wealth of the debtless abode. May we be the possessors of such offspring," etc. These statements perhaps are not so clear as they ought to be, but I would draw attention to one more fact discovered by the aid of Philology, and that is the ancestral abode of the Aryans and their habits and manners. From the known and observed habits and customs of the Hindus and of the Greeks and the Romans, certain conclusions have been drawn, and a very remarkable one amongst them is that on account of the existence of the custom of ancestor-worship both in the Eastern and Western Aryans, ancestor-worship was a common feature of the original stock before separation. That ancestor-worship consisted in the propitiation of the manes of the ancestors by offerings and ceremonies at periodical intervals, and the idea had arisen that every man owed a debt to his ancestors and had to satisfy it by performing these duties for him. In the light of this view, the passage from the Rig Veda becomes clear. Possession of offspring is considered to be possession of great wealth, much more valuable than that of real wealth itself. Hence it is clear that in the Vedic society, the son was viewed as the most valuable possession in satisfying the debts due to their ancestors. This view is made still clearer by illustrations of events in the Vedas themselves. To take one for example:—Viswamitra was possessed of many sons, but they having been degraded on account of some act, he adopts a son Sunahsepa. Now it may very well be asked, on what ground could it be said that Viswamitra affiliated him as a son, when he already had so many sons, who are sufficient in number for the celebrity of the name, although by the fact of degradation they rather make it a notoriety. And the



irresistible answer seems to be that Viswamitra affiliated that son, because the others having become degraded and polluted, were unfit to fulfil and discharge the duties of a son. From the Vedic period, where we find ample evidence of affiliation for purposes other than merely secular, we may next come to the period of the earliest of law compilations extant, the Manu Smriti. It has been roughly placed by European scholars three or four centuries before Christ and refers to a period of antiquity. If we turn to the 9th chapter of this Smriti we find that the subjects of marriage, sonship, inheritance, &c., are treated therein. In this chapter, there are various and undeniable indications of the religious efficacy and of liability to ancestors. Verses 137 and 138 describe a son :—

पौत्रेण क्षोकान् जयति पौत्रिकान्तसम्भव्युते ।
अथ पौत्रस्य पौत्रेण क्षम्भव्याप्तिविद्युपमः ।

" By a son he gets the worlds (heavenly), by a son's son he stays there endlessly, by the son's grandson he obtains the pleasure of the solar world " (v. 137).

पुराणोन्नकाशकान् जायते पितरं सुताः ।
तस्मात्पुत्र इतिप्रोक्तो जयमेव स्वयं भुवा ।

" Because the son saves the father from the hell called Put, so he is termed Putra by Brahma himself " (v. 138).

These two verses place the matter of the son's efficacy in saving their ancestors from hell, beyond doubt. But to show that it was a matter of supreme importance religiously even at the time of the Manu Smriti, we will quote some more verses.

V. 107. परमिन् अर्थं न जयति येन जाये तमश्चुते ।
क एव धर्मेणः पृथः कामजादितरान् विदुः ।

" By whom the debt leaves, by whom the endless is got, he is the son born by a sense of duty, all the rest are known as children of love " (v. 107).

V. 106. ज्येष्ठेन जातसाचेष्ट पूर्णो भवतिसामयः ।
प्रियूषामन्तर्क्षमैव लभ्यते वै त्वं सर्वमहति ।

" By the eldest son, as soon as born, a man becomes a father; he makes the father debtless, and he therefore deserves the whole. "

It is not necessary to multiply instances, but I may refer to a Sruti quoted in the commentary on the above verse to the same effect.

[पृच्छा जातसत्त्विक प्रकाशमन्तव्यम्]

Having thus seen the religious necessity of a son in satisfying the debts to the ancestors of the father, we have next to notice the twelve kinds of sons and their characteristics. After describing the twelve kinds of sons in verses 159 and 160, he says in verse 161 :—

यावृष्टं परमाप्नोति कुप्लवै संतरं जनः ।

तावृष्टं परमाप्नोति कुप्लवैः संतरं जनः ॥

"What kind of fruit he obtains who wishes to cross the sea by the bad boat, that kind of fruit he obtains who wishes to cross the darkness by means of bad sons." This is an advice to every father to provide himself with sons of good qualities, who will consequently save the father from the darkness of hell. I need not quote in *extenso* the verses which speak of the different kinds of sons as being bound to offer oblations to their ancestors. I will only give the reference to a few of them by way of illustration, v. 132 and 140, as regards a daughter's son, verses 136, 139, &c. By far the most important verse is 180 which is as follows :—

देवजातीन् सतानेतान् एकादश्यथोदितान् ।

पृच्छतिनिधोतानः किमःलोपात् मनोधिमः ॥

"These eleven kinds of sons the Kshetraja, &c., are said by the learned to be the substitutes of sons, as they make up the loss of religious acts." This is a clear pronouncement that these eleven kinds of sons are called substituted sons, not because they will simply celebrate the name of their supposed father, but because they make up the loss of religious acts due to the absence of a son, by their performing them : and it is quite certain that according to Manu that was the object for which these sons were allowed. In the face of this verse it seems to me that it is absolutely impossible, to contend that the fiction of sonship by substitution was based on any principle other than the religious. Of course, in the case of the Kshetraja, Godhaja, Kanina, &c., there seems to be no reason why the supposed father should be compelled to keep to himself a child who is not his, and I cannot pretend to bring myself to the view that with a full knowledge of the fact of illegitimacy, which is the same as the above kinds,

a father would allow the boy to be in his family or to be called his son. Now as regards the adopted son in the age of Manu.

"The Datrima son should never take the gotra, or the wealth of the natural father, the pinda follows the gotra and the wealth, and the religious ceremony (पूजा) of the giver ceases."¹¹ (v. 142).

This verse points out what material change is effected by the adoption of a boy from one family to another. The pinda ceases in the one, and commences in the other, and there is a complete change of paternity. In this connection it is also important to notice a verse that is ascribed by some to Atri and by some to Manu.

अपुचेष्य सुतः कार्ये यादृक्त्वादृक् प्रयत्नमः ।
पिंडोदकक्षियजेतोत्तमसंकौत्तमाय च ॥

"By a sonless man should a son be made by one way or other with every effort, for the purpose of the pinda, the water, and other ceremonies, and for the celebrity of the name."¹²

This verse brings most prominently to our view the very purpose for which a son is taken in adoption, and such a clear and unmistakable expression can but lead to one conclusion. Now it may be asked what is the purpose for which the celebrity of the name is mentioned. Is it merely the pleasure of having one's name celebrated or has it any religious significance! It seems to me that the religious necessity for the existence of a son for the payment of the debts to the ancestors having been established by independent verses, the fiction of sonship is made allowable on that ground, so that whatever strangeness might be found in the relationship with the new comer, it is entirely counterbalanced by that religious frame of mind which makes one think that it is absolutely necessary somehow to discharge the debts of one's ancestors, and that therefore for such purpose the person is to be accepted as a son; and being such he, by performing the ceremonies of the adoptive father's ancestors, celebrates their name, and by the fiction continues their lineage. The effect of celebration of name is not, to my mind, an independent effect produced by motives and causes outside the religious view of the matter, but is a proximate and direct result of the religious view and the consequent fiction of sonship. To view otherwise would be to invert what, in the natural course of things, is the relation of cause and effect. We next come to Vasistha and Baudhayana, who give the formalities of adoption after first laying down that a father or mother can give, that an only son can not be so given, and that a woman cannot give except with the consent of her husband. Vasistha says, "He who means to adopt a

son must assemble his kinsmen, give humble notice to the king, and then having made an oblation to fire with words from the Vedas, in the midst of his dwelling-house, he may receive, as his son of adoption, a boy nearly allied to him, or (on failure of such) even one remotely allied. But if doubt arise, let him treat the remote kinsman as a sudra. The class ought to be known, *for through one son the adopter rescues many ancestors.*" The key to the whole passage is the underlined sentence, and it goes fully to support our view of the question deduced from Manu. Then in Baudhayana the passage is similar except that the adopter receives the child with the words, "I take thee for the fulfilment of religious duties. I take thee to continue the line of my ancestors." Strongly enough Mayne in his celebrated treatise quotes this passage for the position that the religious motive never excluded the secular, and he depends upon the last clause that was a secular motive. Such we have already explained was not probable on the true view of the things, and that even that clause in question is but a result of the act based upon the original religious theory.

It is not deemed necessary to mention Sainaka's Karikas at greater length than pointing out that the phrase यज्ञवृत्तिवर्गम् has been made the origin of a number of restrictions which have grown in later days. The phrase means bearing the reflection of a son. Upon this the construction was placed by Nanda Pandita, that it meant that the boy should be such that he could have been begotten on his natural mother by his adoptive father through Niyoga and so forth. Although, as translated by Dr. Böhler and as pointed out by Mayne, the phrase is not really a metaphor, but only an expression which conveys the idea that the son after having been adorned, resembles a son of the adopter's body, still Nanda Pandita's construction of the passage has been universally accepted, as an authoritative exposition of the true view of the law on the matter in question, and is practically beyond dispute now. But it is not a little strange to observe that Nanda Pandita and the latter-day writers had introduced these restrictions upon adoption, when adoption still fulfils such an important duty and is so favoured. Still on a close examination of the question, his interpretation of it is capable of simple explanation, and that is this. Here is a matter of affiliation of a son, and what sort of man is he to be? You have a number of relations, and whom are you to select? Naturally the answer is that boy who would even otherwise be in a position to do the same ceremonies to men of the same degree as the adopter. His affiliation has the effect of transferring his religious acts to another line of the same degree, instead of the line in which the adoptee was born, or to explain the matter much

simpler the selection will always be in the agnatic line, and Nanda Pandita, well aware of the practice in daily life, propounds a rule whose effect is very nearly the same as that seen in actual practice, but which is based upon the single principle of capacity to beget by Niyoga and so forth. We had referred to Manu that a Kshetraja is to perform the ceremonies, and is the chief substitute, so does this son who is such a person as to be fit to be brought forth through Niyoga and so forth, thus establishing our original theory about the matter. "If the primary object of adoption was to gratify the manes of the ancestors by annual offerings, it was necessary to delude the manes, as it were, into the idea that the offerer really was their descendant. He was to look as much like a real son as possible, and certainly not to be one who could never have been a son. Hence arose that body of rules which were evolved out of the phrase of Saunaka, that he must be the reflection of a son. He was to be a person whose mother might have been married by the adopter, he was to be of the same class; he was to be young that his ceremonies might all be performed in the adoptive family; he was to be absolutely severed from his natural family and to become so completely a part of his new family as to be unable to marry within its limits. His introduction into the family must be a matter of free will and love unsullied by every mercenary element." (Mayne, para. 94.) From these things it is, therefore, clear that the origin as well as the development of the law of adoption has been wholly and completely on religious lines. I only wish to refer to the views of Mahmood, J., one of the most distinguished of Indian Judges, and who, from his being a Mahomedan, is not apt to be led away by the supposed religious motives of Brahmanic faith, and whose mind is consequently unbiased. In 9 All., p. 287, in the leading case of *Ganga Sahai v. Lekraj*, he says: "Under these circumstances, the consideration of this point has been with me a matter of great anxiety, for I feel that the conclusions at which we arrive in this court on this point will effect one of the most solemn rights which the Hindu law confers upon childless Hindus, *whose religious feelings have given rise to the institution of adoption itself.*" "Under the Hindu system the beatitude of a deceased Hindu in future life depends upon the performance of his obsequies and payment of his debts by a son as the means of redeeming him from an instant state of suffering after death. The dread is of a place called Put." Then in 12 All., at p. 380, we have from the same learned Judge: "The devolution of inheritance upon an adopted son is a mere incident flowing from the fact of the adoption, and I am unaware of any authority in Hindu Law which lays down that the possession of property is a condition precedent qualifying the powers of the adoptive

parents. Nor am I aware of any authority which would justify the view that the spiritual position of birthless Hindus less important in the case of a separated member. If this is so, and it is also true that the *solitary foundation of the Hindu Law of adoption is the spiritual right of the real or a childless Hindu*, These preages fairly show that this eminent jurist considered adoption as being born entirely based upon the religious theory. As regards the question under discussion, the subsequent works simply quote the above texts and amplify them adding some more restrictions, but none of them deviates from the religious view.

Again the existence of the *Dwiyamushyayana* form of adoption also seems strongly to point to the same conclusion. It seems extremely strange why if the sole motive for adoption, however inimicable, there should ever have existed from such a great length of time a form of adoption whose very purpose is only to perform the religious ceremony and take the property *not confine* of the adoptive father without the said leaving his own natural family, thus leaving no scope for the co-heirship of the time of the adopter's family in the property so obtained. I can not but think that it was purely introduced to make up cases where a *Bhattaka* could not be obtained by proceeding special measures for the religious ceremony need of the deceased containing. We have therefore referred to the letter on top. That involves a complete *lapse of paternity* giving up of the natural parents and taking up the adoptive parents as the real parents which is the keystone to the whole law of adoption and whence to my mind appears to have been a due inference of the necessity of offering oblation to the ancestors of the adoptive father.

ADOPTION OF AN ONLY SON

Till very recently the subject of adoption of an only son was one on which the lawyers of the various parts of India had had different views, and consequently also the decisions of the various High Courts were different. The wide duality of the question was consequent upon the facts that the sages of the sages are of two classes, some creating legal obligations and some creating moral obligations only, that such a distinction was present to the minds of the Suri writers themselves, and that they consequently wanted the former kind of precepts to be mandatory while they wanted the latter only to be recommendatory. Therefore the real question in the present case reduces itself to this, i.e., whether the prohibition of the adoption of an only son contained in Samakar Vaisesha and Baudhaya was only a recommendatory one or a mandatory one. It is proposed to consider the law as

contained in the smritis, the views of the commentators thereon and of Baudha, ayer, on the termes of our paternal (obligations) is nowhere to be found, except in the reduction that has come down to us in the shape of a written report on a case of the adoption of a only son. In that we see that the whole of the Manusmriti was read by four voices, etc., to the subject of adoption. From this Manu has drawn the conclusion that the law of adoption is applied to every one of us born in Manu and that it was necessary to be recorded to bar the purpose of preventing a man without sons. From the fact that no portion whatever is made of the prohibition of the adoption of a only son in Manu, Book I, and Book I, and IV, and V, and the last steps of the Pasya Ganga in the upper form that case inferred that Manu never did prohibit such an adoption, and that therefore the prohibition of the latter day writers was merely a local or the moral sense, and it was not in any way to be construed as locally binding. We will show in due course the view of the Advanced High Court which was accepted by the Pasya Ganga, but it will be sufficient to state our own reason. Such silence of Manu does not lead to the conclusion that the matter was not prohibited at all by Manu, over from a general popular view as to the unheeded that even if such a prohibition were to be found in the original compilation it was expunged in the subsequent edition as a mere graft of no practical application whatsoever. But it in the original compilation in such a position was incorporated there is no reason for supposing that this was due to the fact that Manu did by implication allow such things, thereby exposing that such a provision was omitted as Manu did not understand any such reflection at all specially as view of the moderate measure taken of the law of adoption in his days. The idea of the necessity of sons is not one that has been recently started after Indian civilization under the Islam and influence, and after the religious wars have been started in connection with all sects and creeds, but it is an idea which has been common in the most ancient Hindu community about the religious traditions of which we have any evidence left now. To substantiate this statement reference need be made only to the following passage:—**"सर्वग्रन्थानि फलात् पूर्णा भवति ॥** The weight of a single flower suffices thereof to make us be the possessors of all, we think who has not to begin in back. **"यज्ञो विष्ट्य वास्त्वा देवं तद्गुणाः पूर्णाः** From the Vedas. Endless are the worlds of those who have sons, there is no price for the man who is destitute of male offspring. Drea, "May our enemies be destitute of

offspring.¹ May I obtain O Agni immortality by offspring?² Such is how the law is set that in a stage of society when the pristine habits of ancient Hindu Society were insulted by the intermixture of foreign and other castes nobody would have parted with an only son whose offence in saying his ancestors from hell was very great apart from the weaker reasons that invoke the possession of a son a really advantageous thing to the parents in those early times where practically no one was right. Hence no inference one way or the other being deducible from the fact of the occurrence of such a prohibition in the earliest textbooks we may turn to C. S. Smart writers who express a distinct opposition to such prohibitions. The Smart writers that have a distinct opposition against the adoption of an only son are Vasishtha Baudhayana and Sankhya whom who excepts the greatest controversy centred itself. Vasishtha discusses this question in Chapter XV. versus 1-5 and then continues to give their reasons that are given in verses 6-10.

The verses relating to only son curtailed. **विद्युत ग्रन्थ संशोधनार्थी वर्षम् १०** We next come to Baudhayana whom les Paines the Prece A VII Achyavat has dealt with thus in verse 1-6 and he equally prohibits it. The next Smart writer who prohibits such an adoption is Sankhya. He says in his Sankhya Smarti **संक्षिप्त इति**. It may at once be pointed out that in the other Smarti writers nothing whatever is to be found about the other because no such prohibition was expressed by the ages or he may make a resolution was if expressed originally dropped out in the reduction of that law come to an hindrance we are not in a position to say. Whatever that might be the fact is that those who are against the validity of such an adoption depend upon the statements of the above ages when those who are for it mostly have no other basis to depend upon and try to explain away the distinct prohibition contained in Vasishtha Baudhayana and Sankhya. Next coming to the commentators we find Mitakshara Chapter I Section XI. 9-12 Dattakha Moksha v IV. 1 Dattakha Choudhury Section I v 29 Dattakha Nitayya Jagannatha's Digest 11. 837 referring to the same matter. Now having thus before us the original Sanskrit authorities that have any reference to the subject under discussion we next have to see what is the red meating and not the apparent meaning of these prohibitions. It may also be noted that this subject received a thorough and exhaustive discussion at the hands of V. N. Mandlik and G. C. Sircar two very able men who have combined Sanskrit scholarship with legal attainments and whose opinions in a very great degree influenced the minds of the tribunals in the most recent cases

the decisions in which he has appealed to the Privy Council have settled the law so far as the practice of it is concerned in India. The late Ram Sankar A. N. Maudik discusses the original authorities bearing on the question at pages 198-208, and the case law bearing on the subject at pages 510-514 of his book. He first gives his conclusion on the question by saying that "the said texts must be regarded purely as laying down a mere dictum based on obvious worldly reasons and nothing more." He considers the text of Samaveda first which says — **त्वं यज्ञम् गृह्ण
वर्तु यज्ञम् यज्ञम् वर्तु** — which is translated by Maudik thus — One having an only son should never give him the adoption, and having several sons should give a son in adoption with every effort. It should be noticed here that the translation is a slight departure from what the words वर्तु are understood to mean by Native Pundits and from the translation of the word by Sutherland and Beaufort who turn वर्तु into command of diligence. Maudik points out that no other commentator has taken that view and that the natural interpretation of the word must be taken, and I think the translation of Mr. Maudik is the more correct one being almost literal except that instead of the passive voice in the original, the active voice in the translation is used. Now his next argument with regard to the verse is this. The predicate is वर्तु which may severally be translated into should be done, or must be done, or as proper to do. So that last word by itself is incapable of deciding whether the prohibition or order requiring it to be done is mandatory or recommedatory. But as it occurs in two halves of the same verse it must be translated in the same way in both the halves. Then he goes on to say that the correct translation is — should be done, and not — must be done. His argument for this conclusion is that if you take the first hemistich to involve a peremptory command it should follow that the latter too should be regarded as a peremptory order. But this supposition involves the following anomaly that if the latter proposition be true, it follows that any man can compel his neighbour having many sons to give one of them in adoption to him by a suit at law, and he also strengthens his conclusion by arguing that if the command in question were a peremptory one, a disobedience of it might at the least to be visited with a penance, and that no such visitation is ever mentioned in any of the Smritis or digests. He further fortifies his position by what I may be permitted to call the juxtaposition theory — a theory which says that if a number of precepts occur one after another, and there is nothing whatever in any precept itself to differentiate it from

the rest all the precepts must be taken to be of the same nature of obligation. Mandlik refers to Sāmukha (as quoted above) and says the following on the precepts laid down by Sāmukha—

- (1) The adopted person should ask for a son.
- (2) By the Brahmins' reception of a son should be from Sapindas.
- (3) In the absence of Brahmins from Sapindas.
- (4) In all cases it should be from amongst the respective castes and not from elsewhere.
- (5) One with one son should not make a gift of a son.
- (6) One with many sons should make the gift of a son with every effort.

He says all these are equally recommendatory and there is no reason for holding one more obligatory than the rest. And moreover he finds another text positive showing that such an adoption was not considered by Sāmukha himself to be invalid as he refers to No. (1) more of all these and says that a disregard of the rule creates a party dissension and the adopted is entitled to inheritance if not to a share and his adoption stands and the liability to mount on the adopted boy of a different class. Mandlik says over penalty which attaches to No. (1) only and is not found in the other instances, and hence the rest too are merely recommendatory. As regards the above couplet of Sāmukha Mr. George Gomber in his book on Adoption says that the word विषया in a verse indicates the rule to be recommendatory, for according to the authority of Dayabhāga Vyākhyāna a precept prescribes a duty and not a evil duty and he also says that both the two instructions have the same force and that as you cannot compel a duty to give away one of his three sons so you cannot compel a man to retain his only son to himself.

The first point to be noticed with regard to the interpretation of this verse by Mandlik and Sir Atma is that both the writers ignore the distinction between positive and negative duties unattended by any other conditions or limitations. When a certain act is prohibited by law the mere doing of the act creates a breach of the prohibitory injunction and there is a precept broken. But in the case of a precept which says that a particular act should be done there being no limitation or condition that the act should be done within a certain time or at a certain place or otherwise the precept is not broken and the act may be done as long as there is capacity in the person to do the act. That being so to say that two precepts involving positive and negative duties or acts and forbearances should be treated as being of the same nature and should be construed in the same way is

to meet the clear and obvious distinction that underlies punishment. Now the first part 'क्रान्ति वस्तु गुहाम कर्तव्य' is a precept of laying off the man and the law is broken as soon as the act is done. But the second half 'क्रान्ति वस्तु गुहाम कर्तव्य' is a positive precept which commands that a certain act should be done and its purpose is surely not to be of the same nature as not broken as long as the person is living for he can still give an exception. In the former sequence of act to do the precept is broken and the act done or transgression of the precept is not valid and will be set aside. But in the latter case a man is capable of giving his own exception as long as he lives and the rule for that it does not do so within a certain period is not so infringement of the rule as there is still the possibility of his being as long as he lives there being no limitation of time given or meant for the exercise of such power. Of course the above reasoning proceeds on the ground that both rules are obligatory but on a little reflection it is clear that a rule of the second kind cannot from its very nature be obligatory. Because every duty corresponds to a right inherent in some person and the waive or non-performance of the duty gives rise to an infringement of the right inherent in him and this gives him what is technically termed a cause of action. In the case of the rule under discussion it may be that in the second line of Sankalpa verse the impossible theory as Mr. Manohar himself rightly observes that anybody else in the world can compensate the party in summing there is some person who courage before he exercises the power of giving away a son will be not power to say that he will not do it. Hence from the very nature of things even if such a rule is to be made obligatory it follows from the elementary principle and laying the very notion of law that such a law can never be of good and an unenforceable law it cannot therefore be obligatory. Therefore to say that the meaning of the word कर्तव्य in the latter part of the verse should also be ascribed to the word in the former would be without any foundation for in the case of the second had from the very nature of the duty manifested and of the principles underlying the conception of law it is impossible to say that that rule is obligatory - कर्तव्य having two meanings and being used in such a case must necessarily have only one

meaning, and that is the permissive one. Hence the permissibility of the commandatory use of the word *not* being due to its "but to the particular nature of the precept itself" the meaning that whatever intention is to be given to **त्वय** in the latter half should be given also to the first half due to the ground and the meaning **त्वय** in the first is to be ascertained with reference to that interpretation. Now that being so, the spirit of the stroke is to be referred in connection with the interpretation of the first half, and not of the other half between the two cases. The first relates to the case of *न त्वय* in the latter to the case of *त्वय* never. *त्वय* here may well relate to *not giving*, the *न* relating to giving and *त्वय* and certainly not the least of the salient features in the two parts whose very presence seems to have been entirely ignored, and whose force consequently unappreciated by the two learned writers above mentioned are the two words **न त्वय** in the first and **त्वय** in the second words which are translated into "never" and "by every means," and which being adverbial words modify the meaning of Kartavay so that the predicates are variously **न त्वय न कर्म** and **त्वय कर्म**. By my mind the very existence of these two diametrically opposite words in the two halves in connection with the antithesis ought to be conveyed by the opposite ideas in the two lines clearly gives to the two parts in words the words respectively of no meaning and binding force when considered abstractly opposite and quite thermal, the first thus meaning that you should never do the first thing which you should try your best to do the latter. When I say and that you should try your best to do a thing it is quite clear that the former part presupposes the possibility of the perceptible broken arrow had tried his very best while in the case of the first part "never do" he contemplates that the one should never be broken and disentangled once and agreement with the scheme of the order we cannot but give to the word **त्वय** in the first half meaning which is exactly opposite to that which it bears in the latter half. What I have already said should without conclusive by the two words **न त्वय** and **त्वय** thus giving to the two sentences two entirely different meanings. This view of mine is strengthened from a consideration of the following passage from the judgment of Karna d. Ascertaining you every imperative direction and does do so by us, after the operative **कर्म** the adverb **त्वय** pp. 123-124 14 A.D. Now **न त्वय** and **त्वय** are also similar



adverbs modifying **अन्वय** which corresponds to **प्रयत्न**, the former making it imperative and the latter directory the effect being heightened by the sharp contrast between the two. We may now dispose of the remark of Mandlik that no penance is attached to a breach of this duty. We need only add that that refined legal sense which is attributed to the Smritis by which they distinguish between religious and legal precepts even when they are given side by side also makes them perceive that no religious punishment is necessary as the legal punishment of invalidating the act is sufficient. In this view such absence goes to support the theory that the Smriti writers considered it to be peremptory rather than *recommending* legal rather than religious. We next come to what we have in an earlier part called the juxtaposition theory. Mr. Mandlik's argument on this point to my mind seems to be based upon interpretation which, as has already been noticed, led him to give to **कर्तव्य** the same meaning, as it occurred in two different lines of the same verse, and in this case too the argument may be disposed of by noting the fact that the precepts mentioned under sub-head 16 by him are not all of the same nature nor do they refer to the same question as regarding a party or prevention or status but are a number of rules which are conveniently collected together as referring to one and the same subject namely, the gift and acceptance of a son in adoption and in such a case it would be unphilosophical to say from the mere fact of sequence that all have equal force and are or are not equally binding. Rules 1, 2, 3, 4 only refer to what Mr. Justice Matmeed called *formalities and preferences* in matters of selection which are entirely beyond the pale of legal obligation. Apart from the statement that a partial disability is attached to disregard of No. 16 may be seen from the caste only he infers that this rule alone is sought to be distinguished from the others. No doubt that is so as regard the particular effect that it produces but the very fact that he mentions that the adoption stands although with a partial disability with regard to the rule exactly preceding the rule in question seems to me to be proof that he wanted to differentiate its effect from that of the other and thus signify that the exceptional effect of rule 4 is the above mentioned, while in the case of rule 16 no such result can happen on the very principle *expressio unius*. Nothing further need be added to refute the position of Sivare except that in giving to the word **कर्तव्य** a *recommending* meaning only on the authority of Dayabhaga he stands alone being controverted by Mandlik and by Mr. Justice Kher. We next have to direct our attention to the texts of Yastis and Bandhayana prohibiting

the sole purpose may be served before entering into the question of the construction of these two texts. It becomes necessary to consider two or three questions relating to rules of construction that have arisen in the construction and about which much difference of opinion seems to have existed. The questions that have to be determined are—

- (1) How far do the rules of interpretation contained in the Purva Mimamsa of Badarayana apply to the construction of legal precepts?
- (2) If they do, does the rule that the mention of a rishin makes the rishibhyas or statements supposed to be applicable to matters of sacred ritual also apply to the construction of legal precepts?
- (3) How far and in what cases does the maxim '*Kartum Valet quod fieri non debuit*' apply?

On the first question we have the authority of that eminent lawyer and scholar Mr. H. T. Colebrooke who at p. 342 of his famous Sanskrit Essays says—'The disquisitions of the Mimamsakas bear a certain resemblance of judicial questions and in fact the Hindu law being blended with the religion of the people the same modes of reasoning are applicable and are applied to the one as to the other. The law of the Mimamsa is the logic of the law; the rule of interpretation of civil and religious or criminal cases are examined and determined on general principles and from these decided the principles may be extracted. A well worded argument of men would constitute the philosophy of the law and this is in truth what has been attempted in the Mimamsa.' Dr. Srimati in his commentaries on the Hindu Law, ed. 1886 has at pp. 47-54 discussed the numerous rules of interpretation and says—'Many of the rules are derived from the Mimamsa Darshani and the karmikas of Bhattacharya. There are also some rules which are based on grammar while there are some which are tacitly recognised by Hindu priests.' The subject is also dealt with by Colap Chunder Sarker on ad. pt. on at p. 74 quoting Colebrooke and also in the most recent work on Hindu Law, that of L. C. Gleeson who discusses the question in the appendix at pp. 739-742. As a result of the views of the above named jurists it may be taken that the rules of Mimamsa were intended primarily for the use of religious and ceremonial precepts and secular precepts also being mixed up with religious some of those rules have been made use of by the commentators in the interpretation of certain secular and legal rules. From an examination of the maxims quoted by Srimati as having been applied to the construction of legal precepts we find that they are ad rules which natural logic and common sense

decrees and hence their application to strictly legal precepts is based to a large extent upon this principle also. Hence it seems to me that such of the amavasas have been approved by Sanskrit jurists and made use of as also being applicable to the construction of legal precepts can be applied and that all other rules of the Manusmriti should be carefully considered as regards their nature and applicability before they are made use of with regard to legal precepts.

We next come to the question how far the rule supposed to be contained in the Manusmriti about precepts with a reason can be applicable to the construction of a legal precept. The texts of Varahamihira and Baudhayana under consideration are identical and run as follows— एवं ग्रंह विवर्तने न बुद्ध्यं दाता विवर्तयत् । As regards the text it has been said by Mandlik and Soccket that it is a well-known rule of the Manusmriti that whenever a rule is followed by a reason the rule refers to brothers only and is only recommendatory.

In the view that we have taken of the general applicability of the rules of interpretation it becomes necessary to examine whether the rule has ever been applied by any commentator or whether there is anything in the nature of the rule itself which accords with natural logic or which makes it necessary or equitable to apply it to legal rules. Now as regards the first question the rule in question seems nowhere to have been applied by the Sanskrit commentators to the construction of a rule of law. Although Mr. Mendirita says that Kshemar and Nand Pandita approve of the principle and apply it on an examination of Nand Pandita it will be seen that he simply over the rule contains a reason and says nothing more. I have then on no doubt that Nand Pandita had not the remotest conception of such a rule when he was discussing the adoption of a brother's only son by a brother in D.M. Section II. 48 when he says as follows— And hence from the sake of the gift of an only son even in the present case there is no room for the application of the prohibition. But, same as propounded in the sequel of this text, as regards the reason for he is destined to continue the line of his ancestors the continuation of the line of his ancestors is contemplated by means of a son although common to two brothers. It is established that the prohibition in question refers to persons other than brothers. It is impossible to find how Nand Pandita in this verse tacitly accepts the existence and applicability of any such rule of interpretation. On the other hand he is labouring to steer clear of the prohibition under question, in the case where the only son of one brother is given in adoption to his brother in the Dvyanushayava form as the son of both

the validity of which Nanda Pandita argues established by a text of Manu and goes on to say that the prohibition does not apply to the particular case as it is based on an express text of Manu and also because the act is such that it does not go against the reason for the prohibition contained in the rule and thus establishes that the prohibition extends only to uses other than Dwayamanyavata, adoption of a brother's son. If it could be said that Nanda Pandita recognised the existence and applicability of such a rule of interpretation it would have been much simpler and easier for him to have maintained the rule and to have said that the reason being given is not obligatory and hence the act may be done than to do what he has done i.e., to try to bring the case out of the prohibition in this roundabout way. I may add Nanda Pandita seems on the other hand to assume that every word of the text for the matter as well as the reasons, is totally binding upon us on the well known principle of other prohibition contained in systems of law that due effect should be given to each and every word in a text of law. It is interesting to note that the passage relied on by Mr. Mundlik Nanda Pandita says that as the tenor of the rule is "ordained not to give up a relative too by the mode of adoption". The rule is not broken. Thus applying law to rule as well as to every word of it is surely breaking and he establishes that the particular case neither breaks the rule nor the reason for the rule. See also BhGan. Sect. A 27 and 28.

Having theretofore seen that so far as the law in question has never been placed into service by any commentator till now, it becomes necessary to see whether the two learned authors are entitled to propound the rule as one of unforced application in concrete texts of law. It cannot be particularly noted that Dr. Sumantra who gives 27 rules of interpretation never mentions this among them, although his form of expression is pretty often met with in Sanskrits and that none else of the modern text writers ever thought of the existence of such a rule before these two learned authors have evolved it. In considering this question I can do better than quote the admirable criticism of Mr. Mayo at pp. 16-17.

The rule finally accepted as a governing principle of interpretation would be of such a far-reaching character that it may be advisable to examine whether such a novel and disturbing element should be added to the delimities which already encompass every discussion upon Hindu Law. It must be admitted that the rule does not carry its own evidence with it like a rule of grammar. Nor can it be shown that it was ever accepted by the Rishis, to whose words it is applied or that it was thought of by anybody before it was evolved by Jamini

Nor can it rest on his personal authority unless it can be shown that it has received general acceptance as part of the law of the country. And surely it is remarkable that during the present century no previous instance can be produced in which it has been rejected by any Pandit or Vakil or Native Judge though numberless cases must have arisen in which it would have settled the controversy. It must therefore rest upon some other basis in order to win both the legal and most apparently legitimate with the style of the case says. In the case of a merely earthly husband the states a code of law without anything more. His statement carries with it exactly the weight due to his authority. If he proceeds to say why he states the law to be so, it may be fit to be discussed and rejected. But in the case of the consorts who are either themselves Dr. or D. in speaking the language of the Party every word whether good or bad is equally inspired and is entitled to equal respect. [See North Portland's examination of Dharmasutra quoted above.] It is still necessary to put a limitation upon the words and to see whether the speaker intended to end or to begin. But it is difficult to see how in apparent order, where it is impossible to decide, can be removed of its character because it is followed by a reason which it is impossible to dispute. The second branch of the test would involve an exhaustive examination of all the Sutras. A few instances now ever to open the subject which are at sight out of the present view of the reader. Probably the earliest Rishi who speaks of a widow's right to her husband is Arthaspati. He states her right distinctly and positively and then follows it up with the very satisfactory reason— Of him whose wife is not deceased but the body survives How would another take the property while half the body of the owner lives? ¹ So Maitri gives a reason for the position which he accepts from an unappreciated daughter not to the son of an ordinary daughter. No one I suppose doubts that these texts are mandatory. It is also to be remarked that when a commentator cites a text which contains an error he generally leaves the reason out. In for instance in quoting Aranyakas to the adoption of an only son and Arthaspati as to the succession of a widow. This would indicate that he did not suppose that the reason justified the text. Apparently the reason was intended to strengthen the injunction where the sage was stating a rule which had not been laid down by his predecessors. It is probable that Jaimini's principles of interpretation which were intended to elucidate Vedic ritual are incapable of universal application to secular law.²

But what seems to me to be certainly very remarkable is the authority cited by Maitri for the rule in question. He

refers us to an Adhikarana constructed by Sankaravat on 4 Sutras of Jaimini which Mr. Mandlik calls the Heterogeneous Adhikarana (which means a chapter dealing with texts which have no common reason). But I have examined the Marathi Adhikarana published by Pundit Bhawanrao Vidyasagar at Calcutta in 1883 in which the Adhikarana is contained at pp. 47-60. I have also examined the Sanskrit book of Purushottama Misra, which is also a similar commentary on Jaimini, published at Benares in 1861 under the editorship of P. S. Patnaik Misra Sastri and I have also examined the famous Nyaya Mala a remarkable work of the great Macchuvadhi who at the time he wrote the work was a Swami and was known as Vidyaranya Swami and whose legal work Madhvaviveka — a collection of Smriti of India and is referred to by the Emry Comed in the Ramakatha printed in English between A. D. 1850-60 by Sri Parashara Sanyasi Bhagchandra Mehta Mahopadhyaka. In all these three works the Adhikarana is termed as *Hetum* or *Hetubheda* which is entirely different from *Hetu*. *Hetu* is a suffix which means — contains — whatever *Nat* is called which denotes a person, do or describing. It is not to be forgotten that the Adhikarana refers to texts which appear in texts which concern a reason. These are also termed more probably by the present Adhikarana being the Adhikarana sub-elements. When all these three texts are taken together it is to wonder how Mr. Mandlik could find out in the Bibliothea Indica edition. I have noticed that edition before me but I have no doubt that even though for some well founded reason Mandlik's own for of the following two rule perhaps made him misunderstand it as not Mandlik translates the first portion of the Adhikarana from Sahasra-Swami as — अयं ये वेगविद्या यज्ञस्य कृतिः स एव यज्ञे
विष्णो इष्टेष्व यज्ञे तेषु अद्य एव विष्णु एव यज्ञे विष्णु एव. Now in regard to such Nigada texts having a reason one should seek for by means of a simple test by means of that test a prepared in doubt arises as to whether they are simply commandatory or contain a reason among their oblatory. Now in addition to the initial mistake of misunderstanding the nature and application of the Vaidika-text itself which mistake conspicuously vitiates his whole view there are mistakes in the rendering of his. It is not Nigada texts having a reason but Nigada text that resemble those having a reason again कृति is not commendatory the adjective term but past and in this the portion of his rendering within the brackets is nowhere found in the original and is an addition of the translator but unwarranted by the state of the original text. But I am unable to understand what he means by the addition. If he means

that by containing a reason the text is made obligatory. It is futile to lay own view. If he means the cause creates a reason and is still obligatory it will be concurring that even in the case of causes containing a reason there are some which are obligatory. The true translation seems to be—Now in the case of texts which read like यज् one should sacrifice by means of a sacrifice by means of that food is prepared? a doubt arises whether it is *pratistha* or *reason*. The final conclusion of the *Svāmit* too is mistranslated. It is वाचै यज्ञस्त्रियोऽप्यनुष्ठानं rendered by Mandlik into—Therefore the import of the texts having a cause that ascertains a reason's recommendation only? Here it should be noticed that the word *प्रति* is entirely dropped, undoubtedly mistaking *प्रति* for *प्रमा*. Hence the true translation is—Even though it reads like a Heto-text previous does should be understood. Now the true meaning of the whole *Adhikarana* is this—There are certain texts which are followed by clauses connected by the particle *प्र*. Now *प्र* is a Heto introducing particle and from the meaning of the text there being cause and effect does not follow. Hence in such cases a doubt arises whether it is truly a cause or whether it denotes proved and in the case of such text *butum* comes to the conclusion that they should be construed as *praise*. This is entirely different from what Mandlik understands the passage to mean. Now the effect of construing it as *praise* is stated to be not that it makes the preceding text non-recommendatory but it strengthens the prohibition previously contained in the text. The whole *Adhikarana* in a chapter was rather given to show that there may be certain causes that appear like reasons but are not truly so and they should be considered as denoting *praise*. It may however be asked if that is the effect of *praise* why should it be contrasted with *reason* and does not such contrast lessen the force of the prohibition. The answer to it is stated to be that whenever a Heto is given it may be inferred that all things that satisfy the relation of cause and effect may come under the text. But this inference is of no avail as against an *expression in words* which particularizes a thing. Hence that particular thing alone is to be accepted. I have with great care and attention studied the whole *Adhikarana* with the aid of a learned Pandit and I have not been able to find that it in any way lends support to the theory of Mandlik. He then refers to the Sutra यज् राज्यम् in chapter I Quarter III Sutra 4, at p. 73 which he says makes the matter more clear. Unfortunately it does not at all touch the present question. That refers to a case of a text in the *Brahma* and of the consequent want of authority.

betweenes of the Smriti. It says, There is the text of the Smriti ~~विग्रह~~ and the Smriti text ~~विग्रह विग्रह~~ is opposed to it as the former says you should simply touch it while the latter says you should completely cover it. In such cases the obje^ctor says I am entitled to infer the existence of Smriti corresponding to this Smriti text. The answer is twofold you cannot infer such a thing because there is an express text to the contrary and in the second place the motive or cause for the Smriti text is clear for some people desirous of getting a new cloth cover the Andhakarana without completely and that explains the Smriti text. In such cases there is no room for indeference and hence the Smriti text is no authority ~~मे~~ against an express Smriti to the contrary. I have refrained from quoting the whole of Sabara's commentary as it is too long and cumbersome but I would quote Māṇḍalīk's passage on this as it is very short and truly and correctly represents Sabara's view. It should be noticed that on this point all commentators are agreed that the above is the only meaning for in certain other cases Mañbhāskarāya gives two or three view while in this case he mentions only one too above. On the whole it seems to me that there is no authority whatever for the very general and almost universal proposition that Māṇḍalīk lays down that whenever a text is followed by a reason it tends to be obligatory and is simply merely commendatory. But it may perhaps be said that as in the case of the winnowing basket if the following cause is really a reason contradicting one at saying by means of it food is prepared all things by means of which food is prepared may be used for the sacrifice. But even in that case express words being stronger than inference the former outwings the latter and the text should therefore be followed. Hence *a fortiori* it cannot be said that you may sacrifice with any vessel whatsoever. It seems to me however in the case of Vāstukāya's text about which we are entitled to infer that there is a Smriti text to the same effect that whatever view we may take of the Hētu rule this text comes within the Adhikarana above referred to as Māṇḍalīk himself admits that it denotes prīya. It can therefore be very safely asserted that on a true view of the Mimāṃsā rule of interpretation the strength of the rule in question is not in the least diminished the effect if any being in the way of strengthening it. This error of Māṇḍalīk has been a fruitful source of much misconception about the reason containing rule and I think that if the Mimāṃsā be truly and correctly interpreted as above the whole foundation for the theory falls to ground. When people who have a great reputation as Sanskrit scholars make statements and give constructions of such abstruse and out of the way subjects like the ones

in question it is but natural that English judges should accept those statements and construction as correctly representing the law. The fault is not theirs, but lies with the people who without useful examination and deep study gave forth to the legal world theories which may be self-evidently mischievous to shake the whole fabric of Hindu law to its foundation.

Next as regards *Factum Ficti*. Dr. Soren in his comments on his Hindu Law says at p. 127—A circumstance primarily responsible for the crooked notion which has prevailed so long that the words कथम् अस्य वस्तुत्वाधारण्ये (Dr. H. 30), are equivalent to the doctrine of *Factum Ficti*, the application of the doctrine to matters relating to adoption is altogether unwarranted— and on supported by authority and at pp. 192—194 we have a discussion of the case and Dr. Soren comes to the conclusion that *Factum Ficti* finds no place in Hindu

(Passage from Madhavacharya's Jumna Navay Mala)

तेष चयत्तमिति प्रोक्तो या यो हेतुकृत ज्ञाति ।
हि प्राप्तता हेतु ततः शूष्टीचन्तव्यसाधनम् ॥
शूष्टसाधनकार्योत्तोराक्षोत्तेषाविकारव्यते ।
अतो निःपंचोहेतुकृति ज्ञास्या त्वरसिका ।
इतीयाधिकरणमाहचयति ।

एव मात्रायते शूष्टेष जुडोति तेष चि अत्र किष्टते इति चयत्तमिति विषेये शूष्टे हेतुलेनाविति चि इस्मद्द्वय हेतुवाधित्वात् । अस्यादप्य-
साधनं तपात्कृपेष्ठ जुडोति इतिकृति यदग्रसाधनं इवोपिटादिकं
तेष सर्वेष इतेषामिति चयते ततः पिटादिषोऽपि शूष्टेष सह
विकल्पद त इति प्राप्ते भूमः । शूष्टपंचोमकार्यसाधनत्वं कौतम् इतीयथा
सदवर्गमात् । पिटादीकाम् त्वागुमालिकम् अतः चसमानवकालाद-
विकल्पोयुक्तः । ततो हेतु चर्चा । ज्ञाति प्रदोषवापोषयुक्ता तस्मात्
ज्ञातिलेनावितः ।

Law and the doctrine of *Jumna Navay*, mistaken by some for *Factum Ficti* is only a truism which says that a text cannot alter the essential characteristics of a thing. The same subject

has been discussed by other writers at length and here only reference need be made to them. Gopinathunder Sarker on adoption at pp. 146-147, 150-153; J. C. George Hindu Law, pp. 308-309; Dr. Wilson's works, Vol. V, 71; and Mayne, pp. 196-198. Mr. Ghose considers that although *Factum Iuris* has no place in Hindu Law as pointed out by Srivastava, yet Durmata's getting over the protection contract or defected on any principle other than that akin to the doctrine of *Factum Iuris* in English law. Gopinathunder Sarker says down that where there are legal and no moral prohibition a breach of any moral prohibition cannot be supported on the ground of *Factum Iuris* and such defences or exception of the moral protection is still valid when done thus presupposing that the action is a morally prohibited. Mr. Mayne in his valuable work discusses the doctrine at pp. 196-198 and says in Sermon 16 at p. 198 that "the above principles give a complete case in which it is possible to hold different views on the question whether a particular direction or action is imperative as to be of the essence of an adoption. For instance not only different courts, but the same court at different times have disagreed as to the applicability of the doctrine of *Factum Iuris* to the adoption of an only son".

From these authorities it is quite clear that the doctrine of *Factum Iuris* whether it finds a place in Hindu Law or whether it is founded on it is one of the principles of universal prudence incapable of application to case of a moral prohibition and not of a legal one. Of course it will be absurd to say that when a certain act is legally prohibited from being done it must not exceed after it is done on the strength of *Factum Iuris*. It that be so every legal precept can be broken with impunity and the doctrine will be a universe opposition in supporting breaking of legal rules. No doubt it has been stated "a text has only an inviolable effect" and it cannot prevent illegal acts from being done in the sense that it does not offer any physical obstruction to the perpetration of the breach of the precept but what a legal rule can do and will do provided it is of the nature it purports to be i.e. to adduce the act to treat it as not done at all in the eye of the law although in fact it is done. And in case where the act comes under the definition of crimes the State provides a punishment therefor. Nothing is too heavy for a text and in the eye of the law the action is invalidated by the *Factum* of it being supposed to be non-existent. However clear that this doctrine can be applied to the present question only after we have arrived at the conclusion that Varistha and Baudhayana's prohibition is only admonitory and not mandatory and I may also state that if

we arrive at a different conclusion. The doctrine of *Factum Ficti* will be utterly useless and quite incapable of application to the question under discussion. The text of Yajishta which is also the same as that of Baishnavaya is as follows and the passage in which it occurs may be given as follows:

अथादायाददेव्यनां अहोऽ एव प्रयमः । दत्तको दितीयः । यं
मातापितरौ दद्याताम् ॥ यस्य पूर्वां चमुम् च कथित् दायाद स्वारिते
प्रसा दायं चरेदग्निः ।

प्रोग्निस्मुकसमवा पुत्रं मातापितृनिमित्तकः ।

तस्य दायविकायत्वात् भातापितरौ प्रभवतः ।

मत्तकं पुत्रं दद्यात् प्रतिष्ठाप्तोयादा । न हि संतानाय पूर्वाम् ।

न क्वाँ दद्यात् प्रतिष्ठाप्तोयादा । अन्यथा अनुचानात् भवतु ।

On this text Mr. Mandlik, in view of the strength of the rule of interpretation above adverted to that as it contains a tenor, the precept is only recommendatory and he proceeds to say that on the analogy of Kubera and Nanda Pandita who allow a Dwyanishyava form of adoption of an only son by an uncle to save the fear of the extinction of lineage does not in that case arise. We may say that an only son may be given in adoption by a father or mother who propose to attend to their own salvation and that of their forefathers by either begetting another son or adopting a son or by following one of the numerous ways before mentioned of satisfying the debts to their ancestors. And he cites some examples which happened to his knowledge. From the above passage it is clear that Mr. Mandlik either entirely misunderstood the case of Dwyanishyava's adoption allowed by Nanda Pandita or is arguing on the assumption that the rule is only admonitory and tries to prove that even in that view the adoption of an only son does not go against the reason of the rule, as other arrangements might be made for the due perpetuation of the lineage and satisfaction of the debts to their ancestors. This may appear to be a plausible view but on a closer examination it will be found that what Nanda Pandita allowed is not analogous to the case contended for by Mandlik. The case contemplated by Nanda Pandita is one in which in the very doing of the act you are not going against the reason of the rule as by the peculiar form of adoption the boy continues the line of his real as well as his adoptive father and Nanda Pandita could not be supposed to be so illogi-

ral as to say, — You may break the rule — provided you can subsequently make arrangements for perpetuating your lineage. It does not require much logic to see that as soon as the act is done the rule is broken and this breach is not remedied by any subsequent arrangements that might be made. In this view of the rule it seems clear that Manu's construction is untenable as also from the fact that he greatly depends upon the *big* rule for his support while if it exists at all as we have already shown, or not applicable to bigo priests and would work great mischief by creating many mess followed by consequences which have hitherto been considered by our tribunals to be obligatory under more remunerative rules and thus making the way for everyone breaking with impunity rules which are absolutely obligatory or prohibitory. The next contention that has been put forward by Gopakumar and once referred to by Mandlik is that based upon the absolute property of the parent in the child to the extent of selling or deserting. It has been said that in the earliest stages of human society of which the patriarchal stage was one although not the very earliest the power of the parent over the child was absolute. The patriarch was the owner not only of what he sired and what he got by his labour but was the absolute and practically undivided owner of his wife, his children and whatever had been acquired by them by their own labour. In such a state of society it is quite possible that the father's power could in certain cases of necessity have extended even to the extent of selling away giving away or even deserting his own child but all evidence as regards India points to the fact that such a state of society ceased to exist even at the very early and remote period when Manu's Book was written which roughly has been placed by eminent Sanskrit scholars a few centuries before Christ. In the Manusmriti itself we have abundant and clear evidence of the joint family having become the normal condition in society and of the growth of the rights of the various members of the family as regards the ancestral wealth and any property acquired by their own independent exertions without the help of the paternal home. The text of Manu defining the adopted son shows that a son cannot be given *except in distress*. Less strongly points to the conclusion that even in the time of Manu the father's capacity to give away a son could only be justified by the exceptional circumstances of distress thus negating the absolute and unfettered right of the parent over the child. It is therefore clear that although there are to be found in Manu, Vasishtha, Baudhayana and a host of other Smriti writers verses evidencing the existence of the patriarchal stage yet in view of the fact of their having mentioned the joint family as the normal

unit of society and in view of the fact of their dealing with the rights of the members *inter se* in a way which nearly places the father as well as the sons on equal footing as regards ownership of property and freedom of action as well as from many other points of interest evidence it must be said that the texts which relate to the power of the father over his children and wife or any other texts which point to the existence of the paternal *stava* are only copied by the Saurit writers in veneration for them or to learned ancestors who had gone before and who spoke about such matters from their own experience. Such instances of applying rules are very common and are to be found not only in the brama of adoption but also in every other brama, such as matrilineal service, such being the case it cannot be inferred from the text of Vasishta saying so that he still considers that a father and in his own time, dictates property over his children. Such a view would stand in contradiction against the vested rights of sons in adopted property and also their capacity to appropriate their property separately. But from so, the proper construction of the stanza of Vasishta is that the father had and still has absolute property in his child for so it is not stated the case now but that the origin of these particular rights that the father has over his sons and that property can be explained only on the supposition that the father had originally in ages long gone by power of absolute disposition over his sons who gradually dwindled into its present dimensions. On principle the act of giving away by the father is blamed by Vasishta upon such a right as the father has nobody that does not own property in give it away to another. Hence he says what the rights of the father and mother are over the child as they are found in his own time and hence the existence of such power upon an original right of absolute ownership which dwindled to the extent which he had described. It would be, therefore, inconsistent with sound principles of interpretation to constitute the lines as first giving the father absolute power of disposal over his child and then limiting those powers by the subsequent clauses. But—and it be said that at the time of Vasishta the father has absolute property in his children so as to enable him to deal with them in the manner described in the text. Moreover, as has been said, proprietary right is a creature of the law, and comes into existence by an express text of law. If Vasishta or any other Saurit writer says the father has absolute property over his children, it must be construed so but Vasishta does no such thing. He bases the power of giving on propagation apparently a result of tying his brains to bad a reason. Again, another argument against the application of the doctrine *Faction habeat* to such a case based on the analogy of its applica-

tion by fraud we come to the case of an adoption of such acquired immovable property without his consent it has been previously obtained as to. If it is once conceded that *Factum Vident* applies to this all restrictions and rules imposed upon the adoption of a child by law should be entirely void for the argument applied by Sankar to the above rule applies equally to all other cases on the same text which give the father absolute power; this text or that text only tries to restrain that power and hence the adoption made is still valid as the fact of the power cannot be altered by a enacted texts. In this way we can get rid of almost all those restrictions on adoption which have developed gradually with settled and under more equitable the dominant view of the father and wife though no documents or agreements for their own self and consent are calculated to be very salutary by virtue of the fact that they restrain the father from being it arbitrary and diminish the number of adoption on account of the unscrupulous of the conditions necessary to be satisfied before an adoption can legally and validly be made. It therefore seems to me that such a view of the law is fairly unobjectionable and calculated to upset all settled rules. Moreover the analogy drawn between a son and self-acquired property seems to be more far-fetched and tattered than that which can be drawn between him and property acquired at the expense of or with the aid of ancestral property or with what the blood-sheeps of the Privy Council enjoyed it namely family property inasmuch as the progenitor himself has within his own veins running the blood not of one but of countless of his ancestors and in such a view the restriction on adoption on the ground of necessity seems fair and entirely desirable. Apart from all these the theory of the learned Sastri proceeds upon what I would venture to call a total misconception of the theory of *Factum Videntis* as was the case with the more learned Hindu Lawgiver *Bhavya Vidyam*. For Sankar tries to prove that the text only recommends and hence you can do the act and in doing so applies the doctrine of *Factum Vident* which applies as has been pointed out only to acts of moral abrogations and not to legal ones and says that by applying the doctrine the act can be done and the rule is therefore non-operatory only and not legally binding. It is evident that there can be no clearer use of arguing in a circle as the whole argument proceeds upon the presumption that the rule is non-operatory which the learned Sastri fails strictly to prove.

It may next be said that as the rule is followed by the rule of the woman giving and taking only with the permission of the husband both the rules are of the same nature and are equally

recon mandator. It is clear that no such view can be maintained as no Court has decided that a widow can give in adoption without the sort of permission referred to therein. No doubt different interpretations have been put upon the time when the authority is to be given, either at time of adoption or before, but all the courts except the Madras High Court have been consistent in holding that in the absence of such authority as they construe the test to mean the adoption is invalid. The Madras High Court take the validity of the adoption made with the assent of the *Seconda*, though not with the husband's authority, on the ground of *usages* and also on the principle that the consent may be taken to be sufficient evidence of the desirability of the adoption. There it is clear that no mere assent can be countenanced. In fact as I have ventured to state the true way of construing the text of *Vasistha* is to allow the capacity of the father to give in the case of adoption except the *exempted ones* on the ground of power which is had by begetting the child. Mr. Sankar I arrows out a suggestion that the *Hita* goes down the rule while dealing with the religious side of the question, but far from being so, all the three sages are considering the question of giving and acceptance of a son in adoption and the capacity to give to take and to be the subject of adoption and those three are the essentials of a valid adoption from the civil point of view as laid down by Mahmood J. in *Ganga Sahib v. Lalchand Singh* and it should therefore be said that such rules are dealing with civil matters rather than with religions. It is next important to consider the meaning and force of the words "should not give or take." Mr. Sankar Sastri says this is no more than the prohibition of the gift and it does not carry the matter further than when the gift is prohibited although Mr. Colbran seems to have thought it did. Now it is clear that in order that there may be a valid gift both the act of giving and taking are necessary and in the absence of one or the other of the two there is no legal gift. But the word gift here in addition to the narrower meaning i.e. the physical act of giving is separate from acceptance as the wider meaning in law of a legal mode of transfer without consideration and completed. In this sense it may be said that the prohibition of the constituent elements of the legal act of gift means the prohibition of the whole and hence the whole gift is invalid. At the commencement of the thesis we have referred to the absence of mention by Manu of this prohibition in the *Manu Smriti*. Before leaving the examination of the *Seruti* law on the subject it seems to be necessary to refer to this as the absence of any such prohibition has been construed by C. J. Edges and J. Knox, who delivered the leading judgments in the case. As

proving that Vatsa's prohibition was only recommedatory, and it was to some extent relied on by the Privy Council in support of this conclusion. Now Mr. Justice Kinnar in his learned judgment in Benu Pershad's case in 14 A.B. at pp. 119-121 has collected together all the texts bearing on adoption and he says they are only very few. I will tell me that the following are the only verses in the whole of the Manu Smriti that have any reference whatever to the subject of adoption. They are Chapter IX. 141-142 which say—
 If the tests who bears an adopted son possessing all good qualities, that son shall take the inheritance though brought from another family. An adopted son shall never take the family and estate of his natural father, the funeral fire follows the family and the estate, the funeral obsequies of him who is deceased. Then comes verse 150 which mentions the adopted son one of the six brahman kinsmen verse besides in adopted son. These are the only texts that refer to adoption in the whole of Manu Smriti, and from the absence of any such prohibition Mr. Justice Kinnar Judge C. J. and others infer that there never was any such prohibition, and that it was created and brought into existence by Vatsa who is mainly responsible for them and that therefore it must be concluded that the rule has never been and is never to be considered as absolutely prohibitory. It is to be noted that although Mr. Justice Kinnar says they are very few the question did not present itself to him why the texts were so few and if such a question presented itself to him I dare say he would not have fallen into the error of drawing the conclusion that he did. Mr. Mayne has discussed this matter in a very clever way and if the learned judge had his attention directed towards the question and Mr. Mayne's explanation I believe he would not have fallen into this error. It is an undoubted fact that the law of adoption is a thing of gradual and constant growth from a very small and insignificant beginning, even perhaps in the Vedic ages. But it should not be assumed that the paucity of texts on adoption was due to the fact of the existence of a son not being considered a necessity. However much authorities differ as to the reason for the craving for posterity still all agree that the existence of a son has been from even the primitive stage of society considered necessary and was anxiety sought for. Hence although adoption was not much in vogue still on account of the existence of the other ten kinds of sons, excluding the Aurasas and the Dattakas the craving was amply satisfied. Moreover, that the above view is consistent with the philosophy of law is evident from the fact that in the Amara, Putrikaputra, Kshetrapya, Gadhya etc. there is a closer resemblance in the Aurasas than in the case of the Dattakas, Krita etc. as the stranges

ness of the child and this is not so transparent while in the Hattava and other ancient forms of sons up to jetzt the strangeness of the name does not seem evident and legal to all. Moreover surely must the law not already be added to add to a fiction of law like the fiction of sonship.

And this fact is completely borne out by the paucity of texts relating to adoption in the early Sāmīti writers. We have enumerated above the shākhas that are to be found in Māra and they do not amount to more than four. These texts are only those which define an adopted son and when the first right of inheritance and nothing more and these imply prove that the son was not in Māra's time at least important and that adoption was very easily counted to be the obligation of a son for the perpetuation of lineage in view of the transmission of properties as some although they were not always. Hence it is clear that the restrictions imposed upon adoption were also very few and these without let that as adoption became more and more common the restrictions on it became also largely multiplied to counterbalance the numerousness of cases probably due to the fact of natural instinct being to some extent despised against a stronger as a relation especially a son or a relation is the closest of all relations this son. The only restrictions as if they are really such contained in verse 108 are denoted by the three words वृत्ति वा, विवरण्. If we begin from the last we can easily see that these were not restrictions of a peremptory type but were simply qualifying words describing the character of son points that ought specially to be sought for in the case of adoption विवरण् (who is ultimately disposed of) I have not the least doubt, only a qualifying phrase denoting that it is highly desirable that the son should be ultimately disposed and the interpreter has never so far as I have been able to see even put upon it that being ultimately disposed is a condition precedent for a valid adoption and this is so as the giving is the act of the natural parent and at a time when it is not easy to say whether the boy is ultimately disposed or is disposed in any way at all towards the adoptive parent. Next let us consider the word वृत्ति which literally means similar and what although interpreted to mean of the same or equal in class seems to be to denote a general similarity in disposition habits nearness of relationship status in society, rather than in equality exclusive and exclusively of the other similarities and in this view it seems to be that Māra did not intend to say more than that the son should be similar to the father. Next let

as evinced by the word **प्राप्ति** which means "in distress". In this word Vyomaswara says—**विषयवादप्राप्तिरूपं विद्युतं समर्पय**. From the mentioning of distress no should not be given in the absence of distress, the **समिक्षा** is to the giver. This obviously means that where there is no distress the son should not be given. Mr. Macaulay following Vyavasaya Mayakha by a most strained interpretation sees in this that his prohibition regards the *giver* and not the *son*. It is not easy to see how Vyomaswara had the evolution of the act in his mind at the time of writing his gloss. In my mind the true construction as consistent with the language and the grammatical construction of the word seems to be that Vyomaswara asks himself the question—There is the word **प्राप्ति** whose **प्राप्ति** is the giver to be in distress or the taker? And as the verse says—

"He should give in distress—the **प्राप्ति** or distress is only that of the giver, and not that of the taker." Even in the case of this distress it is clear that it is not in absolute limitation but it was only a limitation introduced by Manu saying that the son should bring compensation as quickly as when the father is in distress. No subsequent commentator has laid stress on this point except the Mitakshara and it is clear that it has never been considered as of legal obligation. Moreover distress—**विद्युतः**—are very wide and general terms and are not specific enough to be known without the further enquiry "what is the nature of the distress whither meant and what is its extent?" Nothing is said about it in Manu and the only conclusion seems to be that by the use of the word he intended that the father can give away a son only in very rare and exceptional circumstances. No other restriction is to be found in Manu and still the courts have ever drawn any inference from such a silence of Manu as regards the restrictions not found therein but later imposed, that such prohibitions not having been mentioned by Manu were *not* *recogitabiles*. If that were not so all the latter restrictions whether of legal obligation will be construed to be mandatory only by the silence of Manu. Hence the true view seems to be that Manu's silence is quite natural as all these restrictions are latter-day developments and Manu could not predict what developments the law of adoption would take in future. On the other hand it may with great reason be urged that the silence of Manu is acceptable by the fact that the subject of adoption being very rare and insignificant the adoption of an only son was a fact never in the contemplation of Manu as likely to take place and for that reason he might not have thought it necessary to mention any such prohibition at

11. Before closing this branch of the subject it is necessary to refer to an argument of Mr. Justice Knox at p. 121, I.L.R. 14 A.C. when in advertizing to two Verses 137 and 148 of the 9th Adhyaya which speak of the importance in giving immortality to the father and preventing him from hell and saying that some commentators infer that Manu did know of the essential predestination but a son must not be an only son. Knox, in his remarks that it will ever be a mystery to hear why Manu should have left it as an inference. But the mystery would have been cleared up and it would have been a blessed day if, if only the view above referred to of the significance of adoption itself nearly always used in the coded development were born in mind and the sanctity of adoption, to be known to have existed between both temporal and spiritual, would surely have pointed to the consciousness that Manu considered the young child was fated to be extremely rare and much less did he think that any boy son would ever be given away, and even if left it was inferred from existing relatives rather than a direct prediction in express terms which seems to have become necessary by the time of Augustus when adoption was more developed than in the time of Manu. Now we come to the text of the Mânakanda which however is not, as those that have gone before me in Smriti, but only a compilation by a learned pro of the Smritis of Varanavidesha. But it has always been a general view of supreme authority over all Hindu except those governed by the Dasyatana so much as relates to interpreting the law contained in the Smritis.

Verses 9 to 11 Chapter I of Manu on the Code

मात्राभन्नेनुच्या प्रोक्षिते प्रति वा भर्तुः तत्पितौर्वा उ भाष्यं वा
मन्तर्याध यस्मै दीपते स तस्य दक्षकः पञ्चः । यद्याच मनुः “मात्रापिता वा
दक्षातासमयमदिभः पञ्चमापदिः । सदृशं प्रोक्षित्युक्तम् अतोपो दक्षिणः
सप्तः॥” इति ॥ आपद्यहृष्टादनापदिः न देयः । दातुः प्रतिषेधः
तथा एकः पञ्चो न देयः न स्विर्कं पञ्चं दक्षात् प्रतिष्ठौषादा इति
विश्वस्यादकाद् ।

तथा अनेक पुत्र कठभावेऽपि ज्ञातो न देय । ज्ञातेन जात-
माज्ञाय पुत्रो भवति मात्रव । इति तस्येव पुत्र कार्यकरणो मुख्यत्वात् ।

¹ He who is given by his mother with her husband's consent when her husband is absent or after her husband's decease of

who is given his father's name being of the same class with the person to whom he is given his name is given over. So Mitakshara declares. By distress it is intimated that the son

~~is~~ ought not to be given unless there be distress. This prohibition

regards the giving. Similarly an only son ~~is~~ ought not to be given for there is no Samskruti of Vasishta to the other that But he should not take an except in only son. Similarly even though there be distress son the eldest should not be given for it is to be given as father by the father of the eldest son from the business of rendering the duties of a son.

It is almost undoubted now that the interpretation of Mitakshara of the pool between a son and his son must not be unwarranted by the language of the original text. As though it were perhaps demanded of the word and put forward by C. J. Sargent (11 P.D. 239) that Gobhrika intended the passage as implying an absolute prohibition; yet we cannot say with Sargent C. J. that Westropp could know the state of the original text, unless he copies it, and it would be as pointed out by the Panchatantra following Gobhrika as of imperial authority instead of his own the text of the Mitakshara, wherein he could have intimated the view of Gobhrika as understood by his commentator.

It need be conceded that these three prohibitions as expressed by Vasishta were not intended in all of the same terms and are connected with each other by the word **पर्वतः** meaning surely. But although there is this common feature, it is submitted that under proper reasons can these should be shown to coexisting all three extracts of the same legal doctrine. In the first place, it is to be noted that an express prohibition whatever may be the nature of it is indicated only as regards the second of these or as to taking the adoption of an only son while the other two adoption exceptions, i.e. of distress and adoption of an eldest son are only the inferences of the author from certain statements of Samskruti writers and it can therefore be asserted that while the prohibition of the adoption except in case of distress and of the eldest son are matters upon which the author has expressed a clear opinion and especially when the Samskruti writers do not expressly or by necessary inference say so the two prohibitions seem to rest entirely on the authority of the commentator himself, and hence many responsible for the view while in the case of the second, that of an only son the author does do more than quote the text of Vasishta and give its purport in his own words which are an exact paraphrase of those of Vasishta.

This difference of treatment is very material, as although the three prohibitions are so clearly expressed still in view of Vyavaswara's quoting the text of Vasishtha and giving its place it is to be understood that as regards these prohibitions it may not be necessary to use the language of law. I have written ~~in~~ the original Sankrit text itself where there is no determination of the binding nature of the prohibition. Of course it cannot be denied that Vyavaswara himself by saying that the son should not be given except in distress ~~and~~ surely an only son should not be given, surely the eldest should not be given, seems to imply that in his view of the case this should not be given and in this respect the three prohibitions are similar. But my submission on this matter is that though they are so expressed still these statements leave the matter entirely in the dark, whether the prohibition is only based upon ~~some~~ considerations, and is simply admonitory or whether all or any of them are legal and binding obligations. And although we cannot decide as to the giving except in distress and the giving of the eldest son at least as regards that of an only son we are referred to the text of Vyasa, whose views to guide us in arriving at a conclusion. Again the nature of the other two prohibitions seems to indicate that they are not *or mithya* or Admonitory. By saying distress it is apparent what sort of distress is meant and what is the quality or magnitude of it and in view of the existence of the prohibition it seems to be capable of enforcement. His view gets strength from the fact that in none of the subsequent texts is this inserted word as a condition precedent for the validity of the obligation except based on purely *Adyaksas* and *Widhi* persons. Now the obligation of the eldest son stands unbroken and bears altogether and is entirely free from the various difficulties above pointed. But in this case also we can merely consider the reasons assigned to the prohibition without ascertaining that it refers to the nature of that no doubt all the sons are able to save their ancestors from hell and to do the功德es of their forefathers and thus perpetuate the lineage of their ancestors but in view of the eldest amongst them being the first and most important of all in doing the duties of a son to his ancestors he should not be given away. Hence supposing the eldest son is given away it undoubtedly comes within Sankara's second class. "By a man having many sons should the gift of a son be made with every effort," which is wide enough to include the eldest son also and although the last son in doing the duties to his ancestors disappears from the series all the other sons are capable of doing these duties. It should also be noted that the text regarding the merits of an eldest son

does not say that there is any difference in the treatment between the case of an eldest and of other sons, but that the eldest son is the chief person in doing the duties of a son referring to the well-known and universal practice of the eldest son performing the usual ceremonies while the other sons stand by him. This is also evident from the fact that when brothers separate from each other not only does the eldest perform all the ceremonies both annual and periodical but all the other sons severally perform the same. Hence from these facts it seems clear that there is nowhere in the whole field of Srauta law an express qualification concerning the eldest son and that although such a son may be given away there is not the least reason for the obstructions of the latter being cast off the account of any infelicity of temporal law. From this it follows that probabilities found here from their very nature are immediately valid and hence it is wrong applying to them a *discrepans* or it cannot be attributed to *Agniswara*. Instead these ought to be considered as of equal force and binding nature.

Here it seems necessary to refer to the translation of Aghoreswar's commentary by Colbrooke where rightly he is called one of the greatest Sanskrit scholars and of whom Mr. Max Müller says

he was not only the greatest Sanskrit scholar but the greatest Sanskrit lawyer whom fire and water produced. Colbrooke while translating the text about the probabilities regarding *agni* except in districts where he could not — while in terms of that of merely suitable uses — most fitly and of that of an eldest son to quote — did not give — No doubt the permission of *Matra* — I — and especially of *Westrappa* — I — proceeded upon a consideration that the words *mast* and *masti* supposed to should cut — in the other two cases were to be so found distinctly in the original work itself. But now compare at the same text and with the translation — I being found that the words are the same — the conclusion was at once drawn that Colbrooke was right — I do not think that anybody would contend that Colbrooke was ignorant of the distinction between *mast* and *masti* — would not — no could it be said that for the sake of elegance he translated the same place in different ways — in my translation where *agni* being used and *masti* *agni* — is to be substituted for the sake of other con-siderations — one could it be said that it was a mere slip for if so there is no reason why the *mast* not — should go with the case of an only son while that of districts and eldest sons are referred to as — should not — nor can it be said that Colbrooke was ignorant that *masti* was the plural used in almost all those three cases for there appears to be no other reading of the text. Hence we can not but infer that the variation was advisedly introduced by Colbrooke to shun the



tente to distinction between the three precepts, the prohibitions regarding an alms-woman contained in Vijnaneswara being construed by him to be of a bairing nature legally, while the other two are not. No doubt it is unfortunate that Colebrooke should have incorporated such a view in the original translation itself, but the editor cannot be resisted that Colebrooke construed the text in the manner indicated above. We will refer hereafter to his independent and express opinion on the matter, but it is sufficient here to say that it is in accordance with the above view. Narada, who is considered by Dr. Bödy to have flourished about the 11th century A.D., and consequently about the same time as Vijnaneswara Yogi, will be referred to later on whether these existing invalid gifts. We next come to the modern writers or writers of the third period according to Knoxy. 1. Surely at the head of these stands the Dattaka Mimamsa of Nandy Pandit, a writer of the Benares Branch of the Mitalabhatta school, who is entitled to stand as an authority in matters of adoption in all parts of India, while the weight to be given when compared with certain other local treatises varies slightly in the various schools. See 12 M.L.A. 137 (Remarks on Rungamati Acarya) 1 M.L.A. 9, 9 A.D. 322 (West Bengal p. 86) 14 Rom. 259, 21 All. 401.

The text runs thus:

इदानो कालम् पूर्णीकार्यं इत्यत आह घौवकः नैकप्रयेका कर्तव्यं पूर्णदानं करावन् वज्ञप्रयेका कर्तव्यं पूर्णदानं घौवकः ॥ शक एव पूर्णीयम्येति एकप्रय तेज तत्पूर्णदानं च कार्यं वस्तिवैकं पूर्ण दशात् उत्तिष्ठत्वोपादा । इति वस्तिष्ठत्वाकात् । अत्र स्व वात्मनिष्ठुतिपूर्वकप्रय तत्प्राप्तादानस्य दानप्रदार्थत्वात् प्रत्यक्षत्वाप्राप्तानस्य च प्रदप्तियहं विन अनुयपत्तेः तत्प्राप्तिष्ठियति । तेज प्रतियहविषेधोऽपि अनेत्रै भिस्यते । अत एव वस्तिष्ठः अनेत्रं पूर्ण दशात् प्रतिष्ठत्वोपादा । तत्र हेतुमाह “स हि सतागाय पूर्वामाः । सतागायत्वाभिभानेनैकास्य दाने संतानविच्छिन्न प्रत्यक्षायो बोधितः । स च दानप्रतियहोत्तेभयोऽपि जभयत्वत्वात् ।

यत् सूक्ष्मतदम् “सुतस्यापि च दाताणी वस्तिष्ठत्वमनुच्छानन् । विक्षेपैव दाने च वस्तिष्ठं च सते पितृः । यत्प्रयोगोऽवरक्षाणां देयं दाता सुतादृत” इति । सहेकप्रयविषयं ।

'कदाचन' आपदि, तथा च नाहृद

निष्ठेपः पुत्रदारं च सर्वस्य वाच्ये सति ।

आपद्यपि चि कदाच वर्तमानेन देहिना ।

प्रदेयात्याकृतवाच्यापद्यत्वाधारम् धनं इति इदमप्येकं पुनः

विषयमेव वर्शिष्टज्ञोनकं कदाचमप्यद्यत ।

This passage from Nanda Purita is clear on the question and says that such a gift is absolutely prohibited. He depends upon Sankaracharya and Narada. We have discussed the views of Sankaracharya and Asvadatta and they are against the validity. We well know that Narada's text is of the same effect. But the conclusion of Nanda Purita is that such a gift is invalid is placed beyond doubt by the use of argument he has taken. He says in order to make a transfer of property, there should be gift and acceptance. And without the latter there is no valid transfer and then he says the text of Sankaracharya implies also that the gift as well as the money given is prohibited and hence no property will pass. A further and stronger reason he gives from the fact that Narada and another Sankaracharya totally deny the existence of any proprietary right of the father in his only son so as to enable the father to give away his only son. Hence his own logic is that no such gift can be made. He also refutes Asvadatta's text to mean that both gift and acceptance are not needed and the same result follows. Mr. Jyotirilyan in criticizing this passage refers to the last part of Sankaracharya's text and is compelled to admit that it is very incomplete but he is apparently carried away by the argument of Mr. Mandlik which we have already pointed out is defective in more ways than one. It has also been suggested that there is internal evidence in the Pratikya Manusa itself to show that Nanda Purita himself did not consider the adoption to be absolutely void and the author of the portion ५ and ६ certainly had want of expressness in his line of reasoning as also referred to. But it is clear that such general remarks will hold no weight whatever when considered along with the line of argument above adverted to as being contained in the passage of Nanda Purita. The only contention that therefore remains to be noticed is that while in Section III in the case of adoption of a boy different in caste the answer of Nanda Purita is that such an adoption is not invalid but if such a son is entitled to food and garment and Section V refers to a case when the ceremonies fail and the result is stated to be that the filial relation even fails in Section IV no such result is stated.

We have shown above the reasoning on which the view of D.M. is based and we have shown the result he had arrived at and if it still be asked why he does not expressly say so all that can be said is he has shown that result by clear and unequivocal texts and otherwise the necessity for quoting those texts will be absolutely nothing. Again Mr. Coorp Chunder Sarkar says that if the adoption of an only son were not valid in law but *ab initio* void there could be no real gift and acceptance and no son could be informed by the so-called giver and acceptor who were parties only to the ceremonial act of giving and taking. When you say that a man contracts sin by the gift or acceptance of a thing you use those words in the attorney sense of extinguishing or creating a right to the thing and if such right is not effected in any way there is neither gift nor acceptance how then can sin be committed by the persons concerned in the sharp transaction. Hence from Nanda Pandita's argument you cannot but draw the conclusion that the adoption of an only son must be valid in law. This argument is entirely based upon a mistaken hypothesis. The argument really is this. If it is true that such a gift is valid in law still as the offence of extinction of lineage is counted twice once attaching to the giver as well as the taker. Hence by prohibiting such a gift altogether such a sin is prevented from occurring and hence the gift and acceptance is prohibited. This is even and requires no explanation but Mr. Nanda Suttra's ingenuity leads him to argue that there can be only sin if there is real gift and acceptance and hence such a gift is valid, although it is liable to sin. The insincerity of the argument is apparent on the face of it. In this connection it is necessary to refer to another passage in book D.M. referred to in a earlier part of this paper that the rule of Vasistha does not apply to the case of adoption of a brother's only son as the offence of extinction of lineage does not there appear and we have given our conclusions thereon before and they fully go to support the theory of Nanda Pandita of the invalidity of such an adoption.

We next come to the *Brahmabandhu* whose authority on matters of adoption is only second to that of the *Mimamsa* although a doubt has been thrown on the authorship of the *Chandrika*. It premises that a brother's son must be preferred to others and answers the objection when such brother's son is his only son by saying that such an adoption constituting the *Dwiyamudhyayana* form, does not come under the test of *Vasishtha* and is therefore valid. The remarks made above on a strict view of *Mimamsa* apply here and prove that the author of the *Chandrika* too considers the rule as binding. Otherwise he need not have tried to distinguish the case from that contained

in Vasishta's rule. The next treatise, the Dattaka Nitya, is the first that clearly upholds the validity of such an adoption, although still from a religious point of view, and thus strikes the first note of discord in an otherwise and hitherto uniform current of opinion. It says—*Next the law relating to the gift and acceptance of a son is considered.*—*On this Vasishta says—*

In this text the prohibition of the gift of a son so as mentioned for the purpose of showing that son is meant by son giving and not for the purpose of showing that the gift is invalid. Similarly also the gift of the first born son is also prohibited, for Manu says—

This work has never up till now been treated of as an authority, and it is not possible to say what amount of authority due to his statement. According to the above conclusion regarding the interpretation of Vasishta's text, he nowhere adduces any argument whether the by its record with naturalness or consistency with jurisprudence should convince us, and then something whatever to compel us to accept the opinion of the author. No doubt it is in favour of validating the adoption, but no weight can be attached to it, as he adduces many arguments to support his conclusion, and as he is not an accepted authority. We next come to the authority's digest composed by Jagannatha Pukka Panikarayat at the instance of Colbrooke about the end of the eighteenth century. He clearly says that such a gift when made is valid although there may be an attaching to such gift and acceptance. Now we regard the authority of Jagannatha conflicting views are held. Mr. Mayne says— Colbrooke in effect avowed a disapproval of Jagannatha's抱持着 as abounding with specious dispositions and as discussing together the discordant opinions maintained by the lawyers of the several schools without discriminating which of them is the received doctrine of each school or whether any of them really prevail at present. On the other hand Mr. Justice Mitter pronounced Jagannatha upon his matra and says—*I venture to affirm last with the exception of the three leading writers of the Bengal school Jayadeva, Jayatirtha, Deva Kramasangraha, the authority of Jagannatha is so high that school concerned higher than that of any other writer on Hindu Law living or dead, not even excluding Mr. Colbrooke himself. His own opinion whenever it can be ascertained may generally be relied on as representing the orthodox view of the Bengal school.* It seems extremely singular that Jagannatha who is considered by Mr. Justice Mitter to be such a legal authority, and by Mr. Mayne to represent generally the views of the orthodox party of Bengal should come to such a conclusion on a question which it must be admitted,

to a large extent depends upon religious benefits, especially when the course of adoption is as will be presently shown was consistent with the orthodox view of the matter. In Satyavati Vitas, the Smritis, Chandrika, the Varanitrodava and other works simply quote Asvins' prohibition without expressing any independent opinion, and therefore they are not discussed here. In the Satyavati Vitas (MS. BHV. A. 10) annotated even S. Mr. Sarker in connection with this says that this accords best with reason. But, he argues, if such an adoption be pronounced invalid in law, the decision must be based upon the principle that a man is legally bound to have a son because such a son is not permitted by law and that consistency with this you must go to. Length of compelling a man whose parents provide himself with sons and the result is obviously absurd. Now the argument would be valid if the irregularity of the adoption is based upon the principle that every person is legally bound to have a son. But this is not the principle involved in the invalidity of the adoption or birth. The invalidity is based upon the parent's incapacity or want of power of giving away an only son or want of law but also he considers however this for the performance of the patriarchal and familial ceremonies and for the perpetuation of their houses and posterity of the same. Hence the want of absolute power of disposal being the basis of the invalidity of such an adoption the rest of Sarker's reasoning built on the assumption of the application of this principle and this principle alone fails to the ground. There are other statements of Mr. Sarker which seem to be very biased and not deserving of much weight such as getting away at last for a poor man with an only son that recursive ceremonies are not performed through poverty or through want of religious enthusiasm and the only answer that should be given to these is that law is made in the view that every Hindu behaves as a Hindu ought to and in consistency with the practice of Hindu society and its practices. The law should be promulgated on the assumption that people generally follow the teachings of Hindu Religion and law, and law is made to meet the requirements of society presumed to be in agreement with Shastras etc. As regards the poor man giving away his only son rather than allowing him to starve, the case imagined by the Pandit is rather extraordinary and I doubt whether such a case ever finds existence in reality except in the mind of the Pandit. I rather thought that it is of any use saying for greater wealth that tempts parent to part with their sons and even then from my knowledge, and from the experience of aged men in this Presidency giving away in adoption is not so often resorted to with purely motives of temptation.

aggrandizement although they form some of the motives which make people give away their sons.

We had occasion to refer to the Smriti Chaitanya and Viramitrodaya and other works as quoting Aycatambha's position and we deferred the consideration of texts of mixed gifts till now. Mr. L. C. Ghose has brought to light the inestimable fact that whenever a son was declared वृद्धः it referred to an only son in the view of the commentators and that वृद्धः was included in वृद्धम् and was not only meant to signify gifts which were merely intended or offered for against religious notions, but were also intended in the case that no such gift can be recognised by law. To meet the suggestion of Mr. Ghose, "There is no room for speculating upon the meaning of वृद्धः." Now Smriti Chaitanya while treating of the gift of a son and saying that it is वृद्धः refers us to his discussion in the chapter on वृद्धिं. On referring to the chapter on gifts we find that the author says down that वृद्धम् includes and means वृद्धः with reference to the following verse of Nanda:

विजेपा पञ्चानं च सर्वसामय मति ।
वापन्तपि वा कष्टमासामनेष देहिता ।
वादधान्याङ्गसाधार्यशक्तिभूमि भवति ॥

It is to be noted that Nanda Pandita too when he quotes this verse says this prohibition of the gift of a son refers to an only son and this is not the same opinion of Nanda Pandita as was expressed by Mr. Justice Kelly in the 14 All case, but the Smriti Chaitanya as well as the Viramitrodaya, distinctly say that even a person can refer to an only son. Aycatambha, who is quoted fully every where in Smriti writer presents the gift of an only son and a wife in similar terms and it is to be inferred that that prohibition refers to the case of an only son. Nanda Pandita it should be noticed quotes another Smriti whose name he does not mention that the father has only power over his own wife's in ordering them and that he has no such power over the son in the matter of gift or see of him. This text distinctly denies the capacity of the father as well as his absolute ownership to dispose of a son in any manner he likes. It follows that in the face of a distinct prohibition the gift of an only son is absolutely invalid. He also quotes the Yugeswara as saying "except the son and the wife anything may be given of her thereby meaning a son is Adeva which is also interpreted by Nanda Pandita to mean an only son. As shown above the Smriti Chaitanya distinctly says that in Nanda Adeva is also

included in Adatta and further proceeds to lay down a rule which appears to the other Smriti texts quoted above—

स द्वौतम्य पराबर्तनमपि भवोद्धिना काँ अदत्ता देय व्यवहार-
यन्तः । अदत्ता च वदेये च दाता सिध्धिभवत् परम्परानुत्पत्ते ॥

which can be paraphrased into—The thing given, should be taken back because both in the case of Adatta and Adeya, the legal effect of gift does not take place till being received of another man's ownership. The *Amaratrodasya* clearly repeats the same thing over, and it does conclusively tell how that even though an object is said to be Adeya, if owned by a wife and legally be made the subject of a gift, and no only son being Adeya, as is seen from the language of the Smriti-writers noticed above, must come within the above ruling, and hence being incapable of being the subject of a gift.

Mr. T. S. R. Pillai in his notes above, also points out that the *Mayukha* also says there is no Vyavahara-Siddhi in the case of an Adeya, and says there is further Pravacanita to be performed. It is undoubtedly true that he too contemplates the non-siddhi of Vyavahara in the case of the adoption of an only son. The *Vyavaha Chintamani* (M. T. Pillai) authority is also quoted as saying that the gift of a wife and son without their consent are void, and as further laying down that an only son cannot be given even when he consents. Hence from these authorities on invalid gifts, the conclusion is irresistible that the gift of an only son is an invalid gift even from a legal point of view apart from the illegality of the act, and the same applying to both the giver and the taker. The above passages I think sufficiently refute the argument of those who contend that nowhere has been said that such a gift is invalid, and that consequently the gift is legally valid although it may be immoral. The above passages show clearly that no property passes in such cases, there is no removal of the ownership of another person, and that there is no Vyavahara-Siddhi in the case of such gifts. No doubt these statements are made generally as regards Adeya, but it cannot be denied that a son and a wife, son being construed to mean an only son, perhaps by its use in the singular, and by the authority of *Vasishta* we Adeya under *tatva*, from the express prohibition in *Vasishta* as regards an only son, he is also an Adeya, and consequently incapable of being legally and validly given away.

Before finally leaving this part of the subject, it seems to me that it is necessary to state that I felt not a little diffidence and fear when I found that my views were entirely different from

those of Mandlik and Sikar who have great reputations Sanskrit scholars and whose views find acceptance at the present time of their Lordships of the Privy Council. I was a little emboldened when I studied Mr. Teling's paragraphs on the subject throwing light on the matter and to say very briefly by a written criticism on the work of Mandlik made by that distinguished Sanskrit scholar and lawyer, K. T. Telang, Esq., whose early death must always be greatly deplored by every one interested in the study of Sanskrit and of law and published in the 11th volume of the *Intern. Inteqary*, a journal of Oriental Research published at Bombay under the editorship of Dr. J. Burgess. It begins at page 51 under the heading *Book review* after discussing the defects that Mr. Telang finds in the translation of the *Mahabharata* which include misinterpretations which are rather few he says. "The defects I have seen are and they are only a few out of those I have observed well I think bear out the ascertained fact that this translation falls very far short indeed of just expectations. They seem to fall into four classes. We have words omitted in the translation which are not always in the original and which are not always necessary for understanding it and which too are not always denoted by translators additions. We have words in the original which are not represented at all in the translation. We have renderings which involve quite unnecessary deviation from the original. And lastly we have renderings which are based on particular options of the text."

Mr. Telang next goes on to criticise the views of Mandlik as expressed in his Introduction and the Appendices. He says—

"The propriety of the law of adoption and matrimony and the Sponde relationship so laboriously discussed in these appendices are now too well established to be upset. The last has been settled by a decision of the Privy Council that there the adoption of an only son has been settled by a decision of the Full Bench of the High Court of Bombay and the principle of descent regarding marriage customs has been bed down probably by too many judges of the High Court to be now upset by any Bench whatever. The point touches the Sponde relationship and the adoption of an only son are both different to me I cannot say however that Mr. Mandlik's discussion of the grounds on which the post-mortem awards are based is satisfactory. I wish before closing this quotation to refer to two very important points on which Mr. Telang criticises Mandlik. The first is as regards the view of Purva Mimamsa about the gift of a son in the Arishtap sacrifice. Mr. Mandlik makes Jaimini say that such a gift should be made. Mr. Telang's conclusion on the point is that the view of the Purva Mimamsa is that the father has no property in his child and that Nilkaitti thinks so too and

that you cannot give his son in a Vayavita sacrifice because he has no property over him. His error is very material for our purpose, as it led him to construe Varishtha's text as giving the parent absolute property over his children which was shown above, is not the case.

Lower down he notices two or three mistakes in transcribing the portion about the subject of adoption. Please will you show that the statements of Madhusukha are not so absolutely correct or authoritative as to be above being subjected to critical examination.

We do not separately examine the views of English lawyers here as their opinions are quoted on all the cases and depended on his authorities for the positions taken. Hence we will not enter into any examination of the law bearing on this subject. The earliest case that arises in Madhusukha is that of Alopakneswar Pillai v. Neelamani Pillai which seems to have come before S. N. 11 as Successor Procurator of Madras in 1801. But the objection does not seem to have been very valid as that boy was the only son of the younger wife there being another son by the other wife living at the time of the giving. S. Thomas Stevens quotes the text of Varishtha and the opinion of Krishnadasa thereon, that such an adoption if made would be valid and says

The opinion of the present Pandits of Benares is that a person who has no one son should not give him away — nor should he give away an elder son — the adoption of an only son is indeed valid, but both never and in every case invalid. This opinion has however been settled in the instance of the Bar of Patna. In that important case the person adopted was the only son of his parents and the master of it was of course that the excommunication from the Bar on the person was imposed upon any ground of Brahminic custom or pury. The objection appears to have been of some deep concern but was refuted in part through the fortunate medium of Sir W. Jones and certainly in a way to induce the masters of Government to be rightly advised. It appears that the Pandits of Benares in general were of opinion that they disapproved the adoption of an only son as valid although the parents who signed the adopted both affirmit by desiring from the upanishads of the Shaster which declare the giving or taking of an only son to be not proper. Brahminic indeed and the other Pandits who sign with him, state that an only son could not be given in adoption to the Raja. But it appears that they rather mean that the act could not be done consistently with the Shasters than that the adoption was invalid for they expressly state that several usages had been adopted and followed that are not found in the Shasters and are to be looked upon as valid. This exposition was considered

at the time or before bringing their opinion with that of Kaswanath and the other Benares Pandits who stated that the adoption of an only son is one of those acts which is tolerated by usage although it is not according to the Shastras. In the first place the above statement of the law was not necessary for the decision of the case and must be taken to be merely an *obiter dictum*. In the second place the decision proceeds upon the view of Jagannath who is clearly inconsistent in Madras and Jagannath's view of Varshita's text is accepted as correct. In the next place the opinion of the other Pandits of Bengal together with the opinion of the Government as the Raja of Jumna's adoption seems to have influenced them. As regards that opinion of the Bengal Pandits it will be shown that there were subsequent opinions written to contradict it, and that the Raja of Jumna's case is only a doubtful one - not only a private opinion taken and no weight is given to the strength of a public opinion. Moreover, the opinion of the Pandits therein seems to go upon the assumption of the validity of the same from saying that such a adoption is not valid according to the texts. It is not known whether there was any long and consistent usage prior to the Pandits but even if it were so then consideration will not be less than a view of the law but upon express and clear language to the contrary. Hence it appears to me that the authorities who Sir James Strong has collected are scarcely not authorities which support the following next best case in 1817 between Arunachalaram and Iyer. Where the question was whether a person was bound to adopt over the only son of another brother the Pandits seem to have stated that such a gift of a son is not lawful and that therefore a man is not bound to adopt such a boy. But they stated

"If such a adoption in fact took place although the gift was never committed in the adoption would it be valid? It seems to be extremely strange how such a gift can be validly made if it is unlawful to give or receive him. Moreover they overlooked the distinction that such a son does not apply to the case of a brother's son. Next we have the case of Perumal Nambiar and Potte Ammal decided in 1851 in which the Pandits are giving an opinion upon the adoption of the eldest son of a brother refer to their own opinion given in 1818 concerning the adoption of an eldest son invalid but distinguish the present as the case of a brother's son and the Court expresses less the validity of the adoption upon this ground. From this we are entitled to infer that they thought the adoption would be otherwise invalid. In 1854 the case of Choommudi and Sarathy atesey being the case of the adoption of an eldest son where the Pandits were pronounced to be invalid but the decision was upset on

of a grant of a present and a portion of time. After the Madras High Court was constituted in 1862 the case came on for direct decision before Sir C. and C. L. and Friend, when the judgment was delivered by the Chief Justice and concurred in by Friend. The Chief Justice refused to take the opinion of the Pandits and held by decided cases to the effect that in a criminal case, Tengot case and Arunachalam Pillai's case, with two concurrent decisions Nandam & Kastur Pandit and Sircilla Javvanceh P. son of Salabandhu, and depending upon the opinion of Sir Thomas Strange that "with regard to both these prohibitions respecting an only and an eldest son where they most strictly apply they are directory only and are not prohibitory." However blame due to the given would nevertheless be every legal purpose be good according to the maxim *Ex parte Videl* had such an adoption to be valid. He considered the contrary opinion of Mr. Justice Strange and disposed of it by saying that it cannot be said that the adoption fulfills its essential use. Mr. Brahm who appeared for the appellant, seems to have relied only upon the passage from Strange's *Mahomedan* where he comes to the conclusion that the procreation is absolute and so the no adoption valid. None of the other texts of *Vasishta Samasca* or *Baudha* seem ever seem to have been brought to these books especially apparently the texts of *Viprae wata*, *Nirala Paratwa* and others not the discussions on grooms in *Sacra Chandas*. It seems to me that the conclusion seems to be based on this that the paternal and undivided case will themselves did not do it expressly and on proper authorities about the validity of other would seem an adoption. In fact the use of Nandam & Kastur Pandit clearly and expressly decides the other way holding such an adoption invalid. Mr. Whately Stokes who appears to have been the reporter adds a note to the case which says "The Hindu law as laid down in the case now reported varies immensely from the Roman rule that the last of his grooms could not enter a new family, lest the sons of the grooms should be lost. This is a very remarkable point and I think if the theory propounded be correct that another wife up was known to that ancient Aryan stock of which the Romans and Greeks of the West and the Aryans Indians in the East are but divergent branches and that it was commonly practised by them before their divergence the theory of the necessity of a son for the purpose of religious offerings is also a very ancient one and it seems but natural to suppose that the sages would not throw only the religious sanction about it but would also try to support it by formulating it around with legal prohibitions.

The next case is A. Sengar and *v.* Vimpal Venkatesh in which the question does not appear to have been an issue, but

Battleton v. Ellesdell pronounced an *obiter dictum* that such an adoption is valid on the authority of the 1 Mad. H.C.R. case. We now come to the case of Narayanaswami v. Kuppaswami, 11 Mad. 44 where the question was directly in issue. But the learned Avukka for the appellants Mr. now Sir A. Brasheera Iyer does not appear to have pressed the objection and their Lordships came to the conclusion that they were concluded by authority. The question did not receive any discussion whatever and it is left to infer what weight is to be attached to it. The next case from Madras is that where settled the question finally on account of the appropriate judgment of the Privy Council and the High Court judgment on the point is reported in 18 Mad. p. 33 under title *Gurumurthy v. Muttuswami Iyer*. The question arose distinctly and was left to let the principal question to be determined in the case. The question seems to have been argued at some length but Muttuswami Iyer J. again thought that the question was not *re arguendo* and therefore before he was concluded by a majority and therefore pleased to examine the question again. He said— There are several Suriyas who forbade such an adoption. They are cited in the hearing case in the subject *Chinni Gounder v. Kurnar Gounder* 1 M.H.C. R. 54. We have already noticed what the various Suriyas were that were quoted in the Gounder case. We have seen the counsel for the appellant relied only upon the passage from Mr. Justice Strange's book and the learned Chief Justice expressly says so at the commencement of his judgment. Hence I fail to see what the Suriyas were that were consulted and examined. Justice Shepherd, who also took part in the case, refused to treat the question as an open one. Hence this does not add to the weight of the original decision. In the course of the argument it seems to have been brought to those Lordships' notice that Turner C.J. and Muttuswami Iyer J., in *Annn Devi v. Vakrama Iyer* had some doubts about the correctness of the decisions but such doubts were not allowed to prevail by the judges in the 18 Mad. case in opposition to express decisions to the contrary. Turner C.J. and Muttuswami Iyer J. are reported to have said—* At the hearing we were inclined to refer the question to a full Bench. But they feared it would be useless as the question was decided in favour of validity, and as a decision of the High Court of Bengal to the same effect was approved by the Privy Council. But they succinctly gave their opinion that there is incapacity in the father to give and therefore such a gift may not be valid. The conclusion to which the subordinate Judge came is very important and must be noticed. He was of opinion that the adoption of an only son was invalid among the regenerate classes to one of

which the parties being known as between them it would be assumed that what is above reported does not affect cases where land property is at a low value between parties who were Suizos according to the report would grow from the letters even though found only in the 4 M.B.C.R case that the parties were Indians. Let then the only one not seen to have been tried or only one the parties being Indians be excluded. The next case is that of the Indian Zorino who adopted an only son the Zorino who was Suizo and the next case Pardha and Agapie Ranayipatam who were Pagan and the last he did not adopt in any manner being dead the question is dropped. It is to consider what turns do the test in all the reported cases belong to in law if no proof given there will not be a case of adoption among Redskins even in the three recognized classes, except in the 11 March 1844 Anne Devine Vassal where the authority to adopt the Indian wife of a father. Now when a state of things must be a mere matter of chance but there is a correspondence reason for this in the fact that in S. Africa I know it may easily be pointed out by Mr. Mayne Captain of the British Army that they do not follow the text of law and prefer to follow their own custom of preference to legal precepts of which they are not the signatory. As the statistics of the Presidency show the Indians and the other Indians however are only about 10% of the total population while the remainder are a combination of adoption cases and Indian settlers who follow customs of their own peculiar to particular castes and unknown in other parts of the Presidency. Adoption is described in the Hindu Smriti being as clear and complete as used up with regard to its rules and of the same nature in the case of the Hindus. I believe no instance comes to be performed the adopted son does not after either the period of or the annual offerings they are what Samudrikas or Karmabikas. In this state of things it is but natural that they should follow their own ways in preference to anything contained in our Sutras. Of course if self adoption were allowed by our Courts upon express usage to the contrary the decisions would have been perfectly sound. But when the use of these principles come to be tested by rules of law which were the offspring of dangerous views the effect was a twisting and turning of the texts to make them applicable to existing facts. The conclusion of the Subordinate judge seems to me to correctly and truly represent the way in which the law is understood in these parts. Item adoption I make made. I am able to point that not a single case of voluntary adoption had arisen in this Presidency in the case of Redskins.

We have to a large extent referred to the views of the Privy Council in discussing the Smriti texts themselves and it is deemed unnecessary to repeat any view although we did not notice any points recurring introduced before the time of the case. In Bengal the result of these representations could not have been the other way. In the case of *Sureswar Mukerjee vs. Durgi Karmakar* 2 S.D.A. 189 the question was referred to the Pandits although it was not the first question before the court and their reply was that in the Dharmashastras the child during its birth is valid for all in the Dharma and free from sin. In *Nandlal vs. Kedarkishore Rayder* 3 S.D.A. 232 decided in 1863 it was submitted that in a general discussion the adoption was declared to be valid though it had not been confirmed or reviewed. The opinion of the Pandits was to the same effect in a noted case of *Shesh Chandra Bhattacharya vs. the Hindu Religious Society* 3 S.D.A. 233 decided in 1870. In this case the two Chanda of the city of Calcutta reviewed a decree of the court in the city. It could be said that there was no opposition. Still the Pandits referred to an authority for the validity while the defendant denied the other way. Next comes the case of *Dwarka Nath vs. Haji Ilor Singh* 4 S.D.A. 620 in the year 1878 who gave the most convincing evidence in favour of the Pandits' side. The fact of his being of only son was left out by mistake in the adoption because a person was forbidden to be adopted and the adoption of the law was carried out either on the part of the government or the part of the Gauri. But the only evidence given in defence seems to have been given in favour of Dwarka Nath. Soh Sondhi Factor's Report from the year 1873 by the Supreme Court of Bengal which however did not affect the case as it was carried on without whose help the case went to the Dwyavati court. The opinion was well determined in his Report and in the *Open India's Review* no. 16 W.C. of Report. Mr. Dwyavati held Mr. Mitra delivered the judgment of the Bench adding the adoption to be invalid. After quoting the Pandit Mukerjee and the Pundit's evidence he says— "The points cited above are sufficient to show that the adoption is prohibited by Hindu law." It is here said that the judgment is sustained in these passages which too strongly in my judgment do not mention and do not avail to the adoption after it has once taken place. We could say more that this contention is erroneous. It is to be remembered that the institution of adoption as it exists among the Hindus is essentially a religious institution. It originated probably if not wholly from motives of religion and an act of adoption is to a limited and pernicious extent but one of such a nature that its religious and temporal importance would be irreparable. One of the essential requisites of a valid adoption is that the gift should be made by a competent person and

The Hindu Law distinctly says that the father of an only son has no such absolute dominion over that son as to make him the object of a sale or gift. The perpetuation of the name is the chief object of adoption under the Hindu law, and if the adoptive father wants the other object, it is not by adopting a child who is the only son of his father. The object of the adoption necessary lies in before passing to the more important one, that is to say, the case of *Masanjast Bodley v. Horner*, which is the case of an adoption in the Kettuvan form, and which is reported in the Weekly Reporter, 1861, at p. 133. In the case of Kettuvan adoption the adoptee does not receive the paternal name and hence the cause for the rule does not exist. We next come to *Marky Gounder Pathi v. Bangalore*, 3 Cal. 433 where the judgment of the Barat Court of Madras is referred to. The judgment shows that even in that study refers to most of the Hindu Adhikar Bodley and Purushottam and holds the well-known authority in favour of revocation of the adoption. The various views of commentators and English text writers were also referred to with the same result. It is also interesting to note that the alternative contention of the case was based on the facts that *the particular section and that the act of sale does not apply* which contention was however overruled. In this case the opinion of Coleridge, the two Maine books and Sutherland are quoted which are also against the validity of sale in adoption. In the first place we find that Sir James Strange in his Hindu Law Vol. I, p. 102 refers to the case of *Viceroy's Bench Petiabees* referred to as having been based upon a completely imperfect model and the decision has been reversed without any comment by Sir E. Macnaghten in his own law book. The opinion of Mr. Coleridge is quoted by Sir E. Strange to the following effect:

If a brother's only son is adopted he need not be taken away from the family of his natural father, but may continue to perform the office of son to both. A valid adoption of an only son cannot otherwise be made than absolute offspring forbidden. Sir E. Macnaghten's conclusion is cited as follows:—"A gift of an only son in adoption is absolutely prohibited. An only son cannot be given or received in adoption. The gift of an only son is deemed to be in impossible people. It is indeed said that an only son may be so given, but it might be said in the same sense, that a wicked man may perpetrate any wickedness if he be content to forego all hope of salvation and be condemned to everlasting punishment. By the gift of an only son the very deformity which the power of adoption is intended to prevent must necessarily be increased. Nothing

in the Hindu Law is more peremptory intended than the gift of an only son in adoption. Even the act of an eldest son is prohibited as sinful. The crime of giving away an eldest son is not so serious as that of giving away an only son. In the one case a Hindu retains in the other he loses away the means of salvation. Considering the precepts and injunctions both positive and negative, upon this subject we must be convinced that no who gives his only son in adoption is little less than an apostate from the Hindu religion. Sir W. H. Macmillan gives in Vol. I at p. 367 as his opinion that if the adoption in a case like it could be removed the injunction being rather against gift than acceptance. But in Vol. II at p. 179 he says referring to the opinion of a Pandit in the event of the gift of the only son of two sons—It will be observed however in the Vyavaharika Pundit's opinion referred to above that he under the command of the law and the reply of the Pandit that it is illegal to give away a son in such circumstances, but in fact the prohibitory injunction applies as well to the giving up of the only son, the reason the same son being considered as putting not only with the sole means of avoiding eternal torment aside but as placing his son also in the same predicament, and endangering thereby the interests of others whom the law will step in its authority to protect.¹¹ This seems to annul his former opinion in favour of validity as suggested by Shirley. At Sir several opinion has been quoted as follows—An only son cannot be given away or dissociated adopted son but he may be addressed as the son of two fathers. In this case the rule of the Pandit in does not apply.¹² Hence we have seen that almost all the English text writers are unanimous in denying the the validity of such an adoption. Even those who have expressed a contrary view in Vol. I Series whatever is discussed in *Every Person's Pillar* is based on incorrect materials and it is said by some that the opinion of Dr. or Mr. Justice Strange quoted supra is also supported by Mr. Strange. We have seen that Sir W. H. Macmillan has written too based on the same way. Hence all the English text writers were for invalidating the adoption. The state of authorisation in Bombay is not quite so uniform. The earliest case that arose was that of Rukket Renu Goven da Rao 2 Bom. 75 in the year 1821. It was a case where twin brothers two sets only gave them both adoption and the opinion of the Pandits was to the effect that although the sin of extinction of the race was with the owner, it was not with the receiver and they therefore pronounced the adoption valid. This was followed by two cases where the adoption of an only son was pronounced to be valid when performed although it was very improper. These two are Numbered 1 & 2 Exavantav 4 BHC R (A) 1.

193 and Melsdon v. Verma 7 BHC App 26. These two were silent with regard to the position. It need be noticed however that Speer who is an authority on personal property law in Western India pronounces that no such adoption could be made except to the boy's paternal uncle or with the consent of both of the boy's natural parents. And Mr. Kishor Lalakar in *Mandalay Ram* reported in 18 BHC 111 with reference to the High Court of Bombay states that it is clear that Hindu law that a boy's son cannot be the subject of adoption and referred to a Calcutta case as supporting his view. In *Kishor Lalakar v. Ramava*, 12 BHC R 317 the question arose whether a widow was entitled to adopt only one child from the express desire of her husband that she should have only one son at the time of her marriage and if the evidence of her husband expressed very strongly against the validity of her adoption. It should however be noticed that in the interpretation of the law of Hindu law as it went when the law was passed it was and cannot be denied so far as it can be inferred from the strength of the view it was however necessary in the first place to consider the Validity of the learned Chief Justice stated. Its proper application must be limited to cases in which there is neither want of authority to give consent nor any want of consent of the person to be adopted. This is well known as a general rule and not only may the consent of the person to be adopted be denied but also the consent of the person to whom he is given up that otherwise the person may be adopted and properly applied. The need for proper consent of the person to be adopted is well known. In the case of *Chaitanya Prasad v. P. Bir Singh* the defendant was found by the court for the adoption. He seems to have been a minor. When he reported to the court in April 1878 he said that he had adopted a child at the age of 10 years. He was then 18 years old. He said that he did not know the name of the person to whom he was given up. Some days later Shiva Ram 6 Ram 33 was a witness before the High Court and reported and told that he saw the same W. H. Gopp Chaitanya Prasad 11 years old in the court believed the previous year. The court then sent Kishor Lalakar to the High Court in view of the adoption. Said Justice which was pronounced on 21st June 1879 held that none of the objections applicable to the adoption could only be applied to this adoption.

In 1879 the case appears to have come before full Bench consisting of Westrupp C. J. and M. Mead, F. T. D. Mervell and Kishor Lalakar on an appeal under Act XXVII of 1860, in the case of the Estate of a deceased person and it is stated that an

order was made subject to the consent of the Court before it could be given effect to by a law, even when such law had never been passed. The learned author says that judgment was to be deferred until after the law allowing adoption of illegitimate sons was made, but that the doctrine of *Ex parte Meek* could not apply after the law was made. But no judgment appears to us to support this view. Hence when the legislative power stepped up in 1883 and as the question was referred to the Full Bench we repeated the conflicting views held about the validity of such a condition. *Wazir v. Parchamdar* 4 *Calcutta* 111 *Bom. 249*. Mr. Justice Webb argued for the appellants and who was one the counsel for the respondents? S. D. informed the Court that the question was argued for two days and the Full Bench分歧 the question of the constitutionality and validity of such a condition. On the other hand the learned P.C. has taken the view that the court were concerned only in the opinion of Mr. Meek which was not allowed to prevail. But in 1883 another case cropped up before the Calcutta High Court Mr. G. G. Gove who is the author we presume of the book of ours, did only one way or another and the Full Bench agreed with him. President Hardinge before we referred the case to the Court of P.C. but the court referred the matter back and directed the Full Bench to consider the question again and hence they held the question to be decided.

In Allahabad the question has a very short history. When the question first came up before the Allahabad High Court the case was cited in *Alibhai v. Bezwala* of the Full Bench and construed *Straw v. L. Peacock* Speaker and *John H. v. H. and others* an adoption was considered blamable and not absolutely evil and was only to be adopted but not to be taken into account. The court of Allahabad Vaidya said that the adoption could not be done in a manner that would offend the public. The construction of the contrary view would be according to Hardinge law to inflict a penalty not only on the givee and receiver but on the father of the receiver whose property might descend to him solely and that the sum in account of benefit is expressed to every but will be found not possibly entered. He also seems to have relied on Col. Brock's translation which however it may be admitted is not accurate and which if so parity weakens the force of his contention. In the next case *Jaloo Ram v. Behram* 12 *All. 288* *Straw* and *Meek* H. doubted the correctness of the above full Bench decision but the case turned on another

question, and hence this question was not gone into. Beni Prasad v. Hardai Bibi, 14 All. 67, the case was again referred to a Full Bench consisting of Edge C.J., Straight, Mahmood, and Knox. We have, in considering the original texts themselves, dwelt at length on the views for the validity of the adoption, which are also the same as those expressed by these two learned Judges, and we need not do more than repeat that these Judges were to a large extent influenced by the opinions of Mandlik and Sirkar, which we have already fully discussed. This case went on appeal to the Privy Council, and after full and exhaustive arguments on both sides, in which Mr. Mayne had the peculiar opportunity of appearing on opposite sides in the two cases, the decision was upheld by the Privy Council, which agreed with the Allahabad judgments broadly, except in minor particulars. They expressed themselves about Factum Valet in the way quoted above, and about the reason rule of Mandlik they declined to express an opinion, as they thought they were unable to find the real truth of it. Our examination of the texts shows what points the Privy Council decided as favouring the validity of the adoption. The difference in language in Saunaka's verse was not brought to their Lordships' notice, and the decision is, in the light of the above criticism, unsustainable on the texts quoted.

Two decisions of the Privy Council are relied on as supporting the validity of the adoption, even before the above decision was given. They are, Nilmadoobdas v. Bissumbar, 13 M.L.A. 85, and Brinati Uma Debi v. Gokulanand, 5 L.A. 40. The learned Chief Justice of the Allahabad High Court in 14 All. says that these are decisions in his favour, but their Lordships of the Privy Council say, "It has been alluded to in two cases, but in so indirect a way that though the authority of the Board is relied on by two sides, it is not available for either." In the first of the above their Lordships said, "If there is on the one hand a presumption that Guru Prasad would perform the religious duty of adopting a son, there is on the other at least a strong presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted, otherwise than as Dwayamushayayana." I am unable to understand how this is an authority in favour of validity. It rather strongly points the other way. In the second case, when the contention was put before their Lordships that the doctrine of Factum Valet is known only to Bengal and foreign to the other schools, their Lordships quoted Madras and Bombay cases where the doctrine was applied. They are no doubt cases of the adoption of an only son, but I do not see how it will follow that their Lordships accepted that the doctrine of Factum Valet applied to such cases. All that their Lordships did was that in

meeting the contention that Factum Valet was unknown in the other schools, they pointed out that it was so applied by the other schools also, without saying in any way whether the Courts were right in thinking that the doctrine was applicable, and much less without saying that it applied in those schools to the particular question. All that their Lordships pointed out was the fact of its having been applied, and they did nothing more.

It remains to notice the course of decisions in Punjab. I was unable to have access to the reports in the Panjab Record, but from their being quoted in Allahabad, I have gathered the following information. Previous to 1868, opinions seem to have been given that such adoptions were invalid, but in the case of *Ajoodia Prasad v. Mr. Denas* (1870), Panjab Record No. 18, p. 58, Simson J. agreeing with the previous decision of the Court held that such an adoption when made will be valid. Lindsay J., however, seems to have thought upon a true construction of the texts of Hindu Law, such adoptions were invalid, but a custom to the contrary having been established on inquiry by the Government, the validity was upheld on that ground. In all the subsequent decisions such adoptions were entirely rested upon custom without any reference whatever to the texts on the subject in Hindu Law. I will simply give the reference to all the cases decided by the Chief Court of Punjab.

<i>Teja Sing v. Socket Sing</i>	..	P. R. (1872), p. 73
<i>Hut Sing v. Gulaba</i>	..	P. R. (1874), p. 183
<i>Soudan Dewan v. M. Subhu</i>	..	(1878), p. 233
<i>Majjasting v. Ram Sing</i>	..	56 P. R. 43 of 1879
<i>Hoshnak v. Tarmal Sing</i>	..	56 P. R. 57 of 1881
<i>Hoshiney v. Jamval Sing</i>	..	(1881), p. 135
<i>Taba v. Shihohurn</i>	..	(1883), p. 306
<i>Huhun Sing v. Maugal Sing</i>	..	(1886), p. 82
<i>Gandu Mall v. M. Rudhi</i>	..	(1896), p. 119

From inquiries I have made, I find that the case of the adoption of an only son never seems to have arisen in the Chief Court of Mysore, or in the High Court of Travancore, and no case on the question is to be found in the Mysore Chief Court Reports, or in the Travancore High Court Reports. One very remarkable point which does not seem to have attracted the attention of the judges in the various cases, or of the two recent writers whose opinions were much relied on, is the existence of the Dvyamu-shayayana form of adoption, a form in which the adopted son by express agreement continues to be the son of both the natural and the adoptive fathers. To my mind, the very existence of such a form of adoption is proof positive that all the sages held the adoption of an only son to be absolutely prohibited. The

Dvyamushyayana form of adoption would have been quite unnecessary if the adoption of an only son were permitted, for in that case the man having given away an only son to another could have himself adopted another boy ; but it seems to me, that all sages and commentators having thought that the adoption of an only son was invalid, they still thought it necessary to provide for certain contingencies that may arise, and hence they seem to have allowed this form of adoption. The adoption of brother's son is based by Kubera and Nanda Pandita on the Dvyamushyayana form being allowed, and in the particular case the relation is said to arise by reason of the act itself, without an express agreement to the effect. An excellent résumé of the subject is given at pp. 223-224 of Mayne's Hindu Law, Sixth Edition.

Some problems that would naturally arise out of the decision of the Privy Council have been considered in the 12th Volume of the Madras Law Journal. The first question is whether an adopted son who is, of course, an only son, can be given away. On principle it should be so, for if the natural father of an only son has, in spite of the express texts to the contrary, an absolute power of disposition over the son, and if by adoption the son is transferred to the adoptive father, all the rights of the natural father must necessarily pass to the adoptive father, and hence the adoptive father should also have powers of disposal over him, and his being an only son being no objection to the gift of him, according to the Privy Council decision, he is a fit and proper subject of adoption ; but the writer of the article comes to a different conclusion, as the word (son) must be taken in its primary and not in its secondary significance. At any rate, the result shows how awkward the logically following out the decision is, and it not a little reflects upon the correctness of the decision. Again another question that is discussed is whether the father, after giving away his only son in adoption, can again adopt another, and the answer given is that he can. It does certainly look as if it is perverting the law to allow a man to part with his son and then to go about for adopting another, but still this is the logical result of allowing a man to give away an only son. Although the learned authors Mandlik and Sirkar lay much stress upon there being other modes of a man obtaining salvation, or Moksha, still one of the chief and imperative duties of every man is the performance of religious ceremonies in the names of the ancestors, and any discontinuance of it is looked upon as very grievous, and I have no doubt that in this part of the country, at any rate, a wilful neglect of this duty is punished by Amksha from the spiritual guru of the community. Hence the popular opinion is universally in favour of continuing those rites

at stated intervals, and every effort is made to secure a person for their performance. Hence even if a man gives away his only son, he still has to recur to the method of affiliating a son, for the purpose of satisfying the manes of his ancestors.¹ But it is clear how ludicrous the result of allowing such a thing is. This too in my opinion goes to prove the incorrectness of the decision. See 12 Madras Law Journal, p. 117 *et seq.*